

142

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 474

**JOSEPH D. MCGOLDRICK, COMPTROLLER OF THE
CITY OF NEW YORK, PETITIONER,**

vs.

**A. H. DUGRENIER, INC., PRINCIPAL, AND STEW-
ART & MCGUIRE, INC., AGENT**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK**

PETITION FOR CERTIORARI FILED OCTOBER 18, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 474

JOSEPH D. MCGOLDRICK, COMPTROLLER OF THE
CITY OF NEW YORK, PETITIONER,

V. H. D. GRENIER, INC., PRINCIPAL, AND STEW
ART & MCGUIRE, INC., AGENT

PETITION FOR WRIT OF HABEAS CORPUS
OF THE STATE OF NEW YORK

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION—FIRST DEPARTMENT**

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and Stewart & McGuire, Inc., Agent, Petitioners,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Respondent

STATEMENT UNDER RULE 234

This is a proceeding pursuant to Article 78 of the Civil Practice Act to review a determination made by the respondent Joseph D. McGoldrick as Comptroller of the City of New York assessing a tax deficiency pursuant to Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 for the period beginning December 10, 1934 and ending September 30, 1936 in the sum of \$6,203.27, which assessment was inclusive of interest and penalties.

The proceeding was begun by the service of an order to show cause and petition and undertaking upon the office of the Comptroller of the City of New York on the 14th day of March, 1938.

An order transferring this proceeding to the Appellate Division of the Supreme Court, First Department, for a [fol. 2] review of the determination heretofore made by the respondent, granted April 18, 1938, was served upon William C. Chanler, Esq., attorney for the respondent, on April 19, 1938.

The answer and certified transcript of the respondent was filed with the Clerk of the County of New York on April 19, 1938.

The names of the original parties in full are:

A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent, Petitioners;

Joseph D. McGoldrick, as Comptroller of the City of New York, Respondent.

There has been no change in the parties since the beginning of the proceeding, except that the respondent Joseph D. McGoldrick is the successor to Frank J. Taylor, as Comptroller of the City of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK—COUNTY OF NEW
YORK, SPECIAL TERM, PART I

Present: HON. JULIUS MILLER, Justice.

No. 6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and Stewart & McGuire, Inc., Agent, Petitioners,
for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Respondent

ORDER TRANSFERRING PROCEEDING TO THE APPELLATE DIVISION
—April 18, 1938

Upon reading and filing the order to show cause herein dated the 14th day of March, 1938 for an order against Joseph D. McGoldrick as Comptroller of the City of New York to review a determination herein, and the petition of A. H. DuGrenier, Inc. and Stewart & McGuire, Inc. duly verified the 14th day of March, 1938, and a copy of the undertaking for costs thereto annexed, together with proofs [fol. 4] of due service of the same upon Joseph D. McGoldrick as Comptroller of the City of New York, and the answer of the respondent by William C. Chanler, Esq., as attorney, duly verified the 23rd day of March, 1938, together with certified transcript attached thereto bearing the same date; and it appearing that the petitioner A. H. DuGrenier, Inc. has paid, under protest, the tax referred to in the said petition to the said Comptroller of the City of New York and has filed an undertaking for costs with the said Comptroller of the City of New York, pursuant to law,

Now, on Motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is hereby

Ordered, that the motion of the petitioners be and the same is hereby granted to the extent of transferring the above proceeding to the Appellate Division of the Supreme Court, First Department, for a review of the determination of the respondent heretofore made.

Enter.

J. M., J. S. C.

[fol. 5]

IN SUPREME COURT OF NEW YORK

ORDER TO SHOW CAUSE

Upon the annexed petition of A. H. DuGrenier, Inc., and Stewart & McGuire, Inc., duly verified on the 14th day of March, 1938, and upon the undertaking of the Century Indemnity Company in the sum of \$500.00 submitted herewith for the approval of the Court, and upon all the proceedings heretofore had herein, it is hereby

Ordered, that the respondent, Joseph D. McGoldrick; as Comptroller of the City of New York, or his attorney, show cause at Special Term, Part I of this Court, to be held in and for the County of New York at the County Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of March, 1938, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made directed to Joseph D. McGoldrick as Comptroller of the City of New York, requiring him to return to this Court all and singular his proceedings, decisions and actions in the premises with the dates thereof, and all and singular the evidence, documents, records and other papers before him or which were submitted to him concerning the said matter, with his determination, particularly the evidence and his determination on the taxability under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 of the receipts of the petitioners during the period from December 10, 1934 to September 30, 1936, to the end that his decision and action may be reviewed and corrected on the merits by this Court, and that any error [fol. 6] committed by him in determining and making such assessment against the petitioners under said Local Laws for the said period in the amount of \$6,203.27, and in his exacting payment therefor, may be corrected according to law, and that the said Comptroller be directed to refund to your petitioners the amount of said assessment of \$6,203.27 paid by them under protest, and that your petitioners may have such other and further relief as may be just; and sufficient reasons appearing therefor,

Let service of a copy of this order to show cause, with a copy of the petition and accompanying papers, upon the respondent or his attorneys on or before March 15, 1938, be deemed sufficient.

The respondent or his attorney is directed to serve upon the attorneys for the petitioners, and file with the Clerk of the Court, a verified answer on or before March 18th, 1938.

Dated, New York, March 14, 1938.

C. B. McLaughlin, Justice of the Supreme Court of the State of New York. Charles B. McLaughlin.

[fol. 7]

IN SUPREME COURT OF NEW YORK

PETITION

To the Supreme Court of the State of New York:

The petition of A. H. DuGrenier, Inc., principal, and Stewart & McGuire, Inc., agent, respectfully shows:

1. Your petitioner, A. H. DuGrenier, Inc., was at all times hereinafter mentioned, and still is, a corporation organized and existing under the laws of the State of Massachusetts, never having qualified to do business in the State of New York.
2. Your petitioner, Stewart & McGuire, Inc., was at all times hereinafter mentioned, and still is, a corporation organized and existing under the laws of the State of New York.
3. The respondent, Joseph D. McGoldrick, and his predecessor, Frank J. Taylor, have at all times hereinafter mentioned been, and respondent Joseph D. McGoldrick now is, Comptroller of the City of New York.
4. Your petitioner A. H. DuGrenier, Inc. maintains no office, nor has it any officers or employees, in the State of New York and its executive offices and manufacturing plant is located in Haverhill, Massachusetts.
5. Your petitioner Stewart & McGuire, Inc. maintains its office at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, and is engaged in the business of soliciting [fol. 8] orders for the products of A. H. DuGrenier, Inc., for which it is paid upon a commission basis.
6. The business of your petitioner A. H. DuGrenier, Inc. consists of manufacturing automatic vending machines and selling the same throughout the United States.

7. All of the products of your petitioner A. H. DuGrenier, Inc. sold to purchasers in the City of New York are manufactured in Haverhill, Massachusetts, and shipped from there.

8. Sales of such products made to purchasers in the City of New York fall into the following classification: Stewart & McGuire, Inc. procures orders in New York City for A. H. DuGrenier, Inc. These orders are transmitted to A. H. DuGrenier, Inc. at Haverhill, Massachusetts, for acceptance or rejection. All contracts of sale are made in Haverhill, Stewart & McGuire, Inc. has no authority to make any contract of sale on behalf of A. H. DuGrenier, Inc. The products are manufactured in Haverhill and are shipped from Haverhill direct to the purchasers in New York City.

9. Local Laws of the City of New York No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 imposed a tax of two (2%) per centum during the period commencing December 10, 1934 on the amount of receipts from the sale in the City of New York of certain property as therein specified, including property such as the products manufactured and sold by the petitioner A. H. DuGrenier, Inc. It is provided in Section 2 of the said Local Law that:

[fol. 9] "Receipts from sales or services by or to the State or City of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the State of New York and City of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder."

10. During the period from December 10, 1934 to September 30, 1936, for which period a tax has been assessed by the respondent herein, the petitioners paid no tax and filed no returns for the reasons that such sales came within the classification described in paragraph "8" hereof, that is, constituted sales on orders forwarded by Stewart & McGuire, Inc. to A. H. DuGrenier, Inc. at Haverhill, Massachusetts, and there accepted and approved by it, in fulfillment of which products of the petitioner A. H. DuGrenier, Inc. were shipped from Haverhill to New York City direct to the purchasers and, in some cases, to points out-

side of New York City, the petitioners being advised and taking the position that such transactions constituted commerce between the several States and that by virtue of the provisions of the constitution of the United States the City of New York was without power to impose a tax thereon and that said Local Law did not purport to impose a tax thereon.

11. On or about January 25, 1937 the respondent Comptroller of the City of New York sent to the petitioners a letter giving notice that he had determined that there was due and payable to the City of New York from the petition-[fol. 10] ers a deficiency of \$5,540.28 in the amount of tax, including interest and/or penalties payable under said Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, for the said period from December 10, 1934 to September 30, 1936, of which \$4,714.41 was principal and \$825.87 was penalties. A copy of the said letter is attached hereto and made part hereof, marked "Schedule A".

12. After the receipt from the respondent of said Schedule A giving notice of an alleged tax deficiency, the petitioners, within thirty days of the date thereof and on or about February 23, 1937, duly applied to the said respondent for a hearing on such determination as provided under the said Local Laws. Thereafter the respondent granted such hearing and a hearing on the said determination was duly had in the office of the respondent and before his duly authorized deputy or representative on March 22, 1937, and upon adjourned dates thereafter. At the said hearings the petitioners introduced certain oral and written evidence in support of their contention that no tax was due from them under the aforesaid Local Laws. The petitioners contended, and introduced evidence in support of their contentions, that all the alleged receipts of the petitioners during the said period in which the respondent claimed a tax under the said Local Laws as set forth in Schedule A, were receipts from transactions in interstate commerce or from sales not made in New York City, or both, and were, therefore, not subject to the said tax.

13. On or about February 16, 1938, the respondent Comptroller of the City of New York sent to the petitioners a letter-[fol. 11] notifying them that on the evidence taken at the said hearings his previous determination as set forth

in Schedule A, plus an increase in penalties amounting to the aggregate sum of \$6,203.27, was confirmed and was declared to be final and irrevocable, and that the amount of the said assessment, comprising principal in the sum of \$4,714.41 and penalties in the sum of \$1,488.86, making a total sum of \$6,203.27, must be paid and that in default of payment thereof the Comptroller would issue a warrant against the real and personal property of the petitioners in accordance with Section 8 of the said Local Laws. A copy of the said letter and determination of the said respondent is attached hereto and made part hereof, marked "Schedule B".

14. Thereafter, in order to avoid the imposition of additional penalties and interest and the issuance of a warrant against its property, the petitioner A. H. DuGrenier, Inc. paid to the Comptroller of the City of New York the net amount of such tax so demanded in the sum of \$6,203.27, such payment being made under protest and duress and being accompanied by a letter so stating and making application for a refund thereof and a request for a determination on such application. A copy of the said letter is attached hereto and made part hereof, marked "Schedule C". No part of the said sum of \$6,203.27 has been refunded to the petitioners by the respondent.

15. The petitioners aver that the entire amount of the said tax so exempted from them under the aforesaid Local Laws was illegally and wrongfully assessed and that the said determination of the respondent the Comptroller [fol. 12] of the City of New York was erroneous in law and in fact because, as proved by the evidence introduced by the petitioners on the said hearings, the receipts of the petitioners upon which the said tax was assessed were derived wholly from sales or other transactions in interstate commerce, and such receipts were not subject to tax under the said Local Laws by the terms thereof, nor did either the City of New York or the State of New York have power to tax the same.

16. Submitted herewith for the approval of this Court is an undertaking of the Century Indemnity Company, being a corporation duly authorized to transact business in the State of New York, as surety, in the sum of \$500.00, to the effect that if the order of certiorari hereby prayed for be dismissed or the tax sought to be reviewed thereby

confirmed, the petitioners will pay all costs and charges which may accrue in the prosecution of this proceeding.

The said undertaking, if approved by this Court, will be filed with the said respondent Comptroller of the City of New York.

Wherefore, your petitioners pray that an order to show cause be granted herein for the issuance of an order of certiorari directed to Joseph D. McGoldrick, Comptroller of the City of New York, demanding him to return to this Court all and singular his proceedings, decisions and actions in the premises with the dates thereof, and all and singular the evidence, documents, records and other papers before him, or which were submitted to him concerning the said matter, with his determination, particularly the evidence and his determination on the taxability under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936 of the receipts of the petitioners during the period from December 10, 1934, to September 30, 1936, referred to in Schedule A annexed hereto, to the end that his decision and action may be reviewed and corrected on the merits by this Court, and that any error committed by him in determining and making an assessment against the petitioners under said Local Laws for the said period in the amount of \$6,203.27, and in his exacting payment thereof, may be corrected according to law, and that the said Comptroller be directed to refund to your petitioners the amount of said assessment of \$6,203.27, paid by them under protest, and that your petitioners have such other and further relief as may be just.

That an order to show cause is requested herein, returnable at Special Term, Part I of this Court on March 17, 1938, at ten o'clock in the forenoon of that day, for the reason that the petitioners' time within which to apply for an order of certiorari herein will expire on March 18, 1938 and the petitioners will be unable to comply with the statutory provisions for eight days' notice of this application to the respondent.

That no previous application has been made for the relief sought herein.

Dated, March 14, 1938.

Stewart & McGuire, Inc., by Walter H. Mann, Vice-President. One of the Petitioners herein. (Verified by Walter H. Mann, March 14, 1938.)

[fol. 14] SCHEDULE A ANNEXED TO PETITION

Frank J. Taylor, Comptroller. Worth 2-4780.
 Milton Solomon, Deputy Comptroller.
 City Sales Tax Registration No. —
 30-Day Notice.

THE CITY OF NEW YORK
 Department of Finance
 Emergency Revenue Division,
 50 Lafayette Street, New York City

January 25, 1937.

Stewart & McGuire Inc. Agents &
 A. H. DuGrenier, Inc. Principal
 350 Fifth Avenue
 New York City

Local Law No.	Deficiency
24 of 1934	\$3787.05
29 of 1935	1470.53
31 of 1936	282.70
Total	\$5540.28

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a tax deficiency of \$5540.28 pursuant to Local Laws 24 of 1934, 29 of 1935 and 31 of 1936, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$194.07	\$970.35
	5/31/35	999.18	219.82	1219.00
	8/31/35	697.83	139.57	837.40
	12/31/35	655.43	104.87	760.30
29	3/31/36	563.20	73.22	636.42
	6/30/36	758.28	75.83	834.11
31	9/30/36	264.21	18.49	282.70
Total		\$4714.41	\$825.87	\$5540.28

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after the date hereof.

[fol. 15] Section 15 of the aforesaid local laws provides in part as follows:

Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this local

law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 of the aforesaid local laws will become operative.

If you agree with the determination of your tax liability as stated above, please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller.

[fol. 16] SCHEDULE B ANNEXED TO PETITION

CITY OF NEW YORK

Department of Finance

Emergency Revenue Division

50 Lafayette St., N. Y. C.

City Sales Tax
Final Determination
Misc.

Feb. 16, 1938.

Stewart & McGuire, Inc. Agents
A. H. DuGrenier, Inc., Principals
350 Fifth Avenue
New York, N. Y.

Local Law No.	Deficiency
24 of 1934	\$4058 64
29 of 1935	1599 45
31 of 1936	306 48
	\$5964 57

GENTLEMEN:

The Comptroller hereby determines that as a result of a hearing held at this office in connection with your tax liability to the City of New York for the period from December 10th, 1934 to September 30th, 1936 pursuant to Section 7 of Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936,

there is due and payable to the City of New York a deficiency of \$6203.27, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$302.75	\$1079.03
	5/31/35	999.18	359.68	1358.86
	8/31/35	697.83	237.26	935.09
	12/31/35	655.43	196.63	852.06
29	3/31/36	563.20	152.06	715.26
	6/30/36	758.28	182.00	940.28
31	9/30/36	264.21	58.48	322.69
Total		\$4714.41	\$1488.86	\$6203.27

This determination, which is final and irrevocable, is the result of an analysis of the testimony taken at the above- [fol. 17] mentioned hearing. The testimony discloses that you are a vendor engaged in the sale of tangible personal property within the City of New York, upon the receipts from which you are required to collect the tax and to pay the same over to the City of New York. Payment of the tax due must be made to this office within thirty days of the date hereof, and this letter or a copy thereof should accompany your remittance. Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York, 50 Lafayette St., New York City.

In the event of your failure to pay the tax due, the Comptroller will issue a warrant in accordance with the provisions of the law. Section 8 of Local Law No. 24 of 1934, No. 29 of 1935, and No. 31 of 1936 provides in part as follows:

"Whenever any vendor * * * shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law * * * the comptroller may issue a warrant directed to the sheriff of any county within the City of New York commanding him to levy upon and sell the real or personal property of the vendor * * * which may be found within the county, for the payment of the amount hereof, with any penalties, and the cost of executing the warrant * * *"

Very truly yours, (Signed) Samuel Orr, Special
Deputy Comptroller.

[fol. 18] SCHEDULE C ANNEXED TO PETITION

March 12, 1938.

City of New York, Department of Finance, Emergency
Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Samuel Orr, Special Deputy Comptroller

Re: Sales Tax—Local Law No. 24 of 1934, 29 of 1935, 31 of
1936

DEAR SIRs:

As attorney for A. H. DuGrenier, Inc., I hand you herewith its cheque in the amount of \$6,203.27, dated March 11, 1937, payable to the order of the City Collector.

This payment is made, under protest, in compliance with the demand contained in your letter of February 16, 1938, a copy of which is attached hereto, in which you notified the aforesaid corporation that the Comptroller's determination assessing a sales tax, with interest and penalties, in said amount, is declared final and irrevocable.

On behalf of A. H. DuGrenier, Inc., you are advised that this payment is not voluntarily made but is made under duress and in order to avoid additional penalties provided for under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, and the issuance of a warrant against the property of said corporation, as stated in your said letter.

The aforesaid corporation, in making this payment, does not admit the validity or legality of the said assessment, but, [fol. 19] on the contrary, denies such validity and legality and that the same is authorized by said Local Laws or within the power of the City of New York to assess, being based on transactions in interstate commerce; and the aforesaid corporation expressly reserves all its rights to review the said determination of the Comptroller by certiorari or otherwise as may be permitted by law.

In behalf of the aforesaid corporation, I hereby make application for a refund of the said assessment amounting to \$6,203.27, payment of which is made herewith, and it is respectfully requested that the Comptroller give notice to the undersigned, as attorney for said corporation, of his determination on this application for refund.

Very truly yours, (Sgd.) John H. Jackson.

Enclosures: JJM:p.

[fol. 20] IN SUPREME COURT OF NEW YORK

ANSWER

The respondent in this case by William C. Chanler, Esq., his attorney, for his verified answer to the petition herein, upon information and belief, respectfully:

1. Denies each and every allegation contained in paragraphs "7", "8" and "15" of the petition.

2. Denies each and every allegation contained in paragraph "10" of the petition except that it admits that no tax was paid by the petitioners and that the petitioners filed no return during the taxable period.

3. Denies each and every allegation contained in paragraph "14" of the petition except that it admits that the petitioners paid to the Comptroller of the City of New York the sum of \$6,203.27 under protest and that the letter annexed as Schedule "C" in the petition was received by the Comptroller.

4. Admits each and every allegation contained in paragraph "12" of the petition and respectfully refers the Court to the testimony taken at the hearing before the Comptroller on March 22, 1937, as to the matter alleged with respect to that hearing.

[fol. 21] As and for a Statement of the Grounds of the Action Taken by the Respondent Which is Complained of, Respondent Further Alleges on Information and Belief:

5. That between December 10, 1934 and September 30, 1936, the petitioners sold at retail in the City of New York for purposes other than resale, tangible personal property upon which sales it failed and refused to collect the tax due according to Local Law No. 20 of 1934 as amended by Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936, and petitioners were and are liable for such taxes.

6. That as a result of a hearing held at the request of the petitioners before the respondent at which hearing the evidence was taken pursuant to the statutory direction contained in the said Local Laws, the respondent determined that there was due and owing from the petitioners by reason of the foregoing taxes in the sum of \$6,203.27 (inclusive of interest and/or penalties) for the period beginning December 10, 1934 and ending September 30, 1936.

7. That hereto annexed and made a part of this answer is a duly-verified transcript of the record of the proceedings before the Comptroller mentioned in the petition herein and subject to review or consideration in this proceeding.

8. The evidentiary facts upon which the determination of the respondent was based are such as are embodied in the certified transcript of the record of the proceedings, the [fol. 22] minutes of the testimony taken and the written documents introduced into evidence at the hearings; and the determination of the respondent which is complained of is in conformity with the law and the facts and is sustained by the record.

9. This proceeding requires the determination of questions involving the merits that fall within subdivisions 6 and 7 of § 1296 of the Civil Practice Act and as such is properly transferable for disposition to a Term of the Appellate Division of the Supreme Court of the State of New York, First Department.

WHEREFORE, respondent prays for an order transferring the within proceeding to a Term of the Appellate Division of the Supreme Court, First Department, and for a final order dismissing the proceeding herein on the merits, and for such other and further relief as to the Court may seem just and proper in the premises together with the costs of this proceeding.

William C. Chandler, Corporation Counsel, Attorney for Respondent, Office and P. O. Address: Municipal Building, Borough of Manhattan, City of New York.

[fol. 23] *Duly sworn to by Arthur V. McDermott. Jurat omitted in printing.*

[fol. 24] IN SUPREME COURT OF NEW YORK

CERTIFICATE TO TRANSCRIPT OF PROCEEDINGS

To the Supreme Court of the State of New York:

Arthur V. McDermott, as Deputy and Acting Comptroller of the City of New York, does hereby certify this transcript

of the record of proceedings herein, consisting of all and singular his rulings and assessment, together with his proceedings, decisions and actions in the premises and all and singular the evidence, documents, records and all other papers before him, or which were submitted to him or to his predecessor in office, Frank J. Taylor, concerning the taxation of the petitioner upon receipts from sales of tangible personal property upon which petitioner failed to collect the tax during the period from December 10, 1934, to September 30, 1936, pursuant to Local Law No. 20 of 1934 as amended by Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936.

1. Notice of assessment of deficiency tax pursuant to Local Law No. 24 of 1934, Local Law No. 29 of 1935 and Local Law No. 31 of 1936 in the amount of \$4,714.41 with penalties in the sum of \$825.87 for the period from December 10, 1934 to September 30, 1936, including exhibits and schedules attached thereto if any, which notice of tax deficiency is dated January 25, 1937.

2. Letter dated February 23, 1937 addressed to the Department of Finance, City of New York, Emergency Revenue Division, by Hall, Cunningham, Jackson and Haywood, [fol. 25] attorneys for the petitioners requesting the Comptroller to set a hearing for the purpose of reviewing said tax deficiency assessed against petitioners.

3. Letter to the Department of Finance, City of New York, Emergency Revenue Division, dated February 23, 1937, signed by Arthur H. DuGrenier, Inc. by F. C. DuGrenier, President, requesting the Comptroller to set a date for a hearing in order that the said tax deficiency against petitioners might be reviewed.

4. Letter of Milton Solomon, Deputy Comptroller, addressed to Hall, Cunningham, Jackson & Haywood, Esqs., attorneys for the petitioners, dated March 15, 1937, advising that a hearing would be held in respect to the tax deficiency in Room 839 at No. 50 Lafayette Street, Borough of Manhattan, on May 4, 1937 at 2.30 P. M.

5. Minutes of testimony taken at a hearing held on May 12, 1937 before the Comptroller of the City of New York by one of his duly authorized employees, together with the exhibits therein referred to.

6. Determination of the Comptroller of the City of New York dated February 16, 1938 addressed to Stewart & McGuire, Inc. Agents and A. H. DuGrenier, Inc. Principals at 350 Fifth Avenue, New York City, advising that as a result of the hearing before the Comptroller on May 12, 1937, the Comptroller was determined that there is payable to the City of New York from the petitioners the tax deficiency of \$6,203.27 (including interest and/or penalty) for the period December 10, 1934 to September 30, 1936, pursuant to Local Laws No. 24 of 1934, as amended, Local Law No. 29 of 1935 and Local Law No. 31 of 1936.

7. Letter from John H. Jackson, Esq., attorney for Hall, Cunningham, Jackson & Haywood, Inc., dated March 12, 1938, addressed to the City of New York, Department of Finance, Emergency Revenue Division, enclosing check of A. H. DuGrenier, Inc. in the sum of \$6,203.27 payable to the order of the City Collector.

In Witness Whereof, the Comptroller of the City of New York by a Deputy and Acting Comptroller of the City of New York has hereunto set his hand on this 23rd day of March, 1938.

(Sgd.) Arthur V. McDermott, Deputy and Acting Comptroller of the City of New York.

R. G. B.
O. S. C.

[fol. 27] NOTICE OF ASSESSMENT

The City of New York, Department of Finance
Emergency Revenue Division,
50 Lafayette Street, New York City

30-Day Notice

January 25, 1937.

Stewart & McGuire Inc. Agents &
A. H. DuGrenier, Inc. Principal
350 Fifth Avenue
New York City

Local Law No.	Deficiency
24 of 1934	\$3787 05
29 of 1935	1470 53
31 of 1936	282 70
Total	\$5540 28

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined

that there is due and payable to the City of New York a tax deficiency of \$5,540.28 pursuant to Local Laws 24 of 1934, 29 of 1935 and 31 of 1936, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$194.07	\$970.35
	5/31/35	999.18	219.82	1219.00
	8/31/35	697.83	139.57	837.40
	12/31/35	655.43	104.87	760.30
29	3/31/36	563.20	73.22	636.42
	6/30/36	758.28	75.83	834.11
31	9/30/36	264.21	18.49	282.70
Total		\$4714.41	\$825.87	\$5540.28

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after the date hereof.
[fol. 28] Section 15 of the aforesaid local laws provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of the tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due"

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 of the aforesaid local laws will become operative.

If you agree with the determination of your tax liability as stated above, please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Very truly yours,

(Sgd.) Milton Solomon, Deputy Comptroller.

EXHIBIT "A"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
 50 Lafayette Street, New York, N.Y.

Stewart & McGuire Inc. Agents

Name of Taxpayer A.A.H. Grenier Inc. Principal Registration No. Misc.
 Address 350 Fifth Avenue, NYC Local Law No. 20 of 1934, as amended
 Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant: P. Amberg

Item No.		PERIOD AUDITED				Sch. No.
		12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
A	Tax Due the City of New York as reported (Item 30 of return).....	-	-	-	-	
B	Add- Tax-Two per centum of additional taxable receipts (Exhibit "C").....	776.28	999.19	697.83	655.43	
C						
D	Total tax (Items A to C inclusive).....	776.28	999.19	697.83	655.43	
E	Amount of tax-Two per centum of total receipts as adjusted (Exhibit B).....	776.28	999.19	697.83	655.43	
F	Tax due the City of New York (Item D or E, whichever is greater..	5128.72	776.28	999.19	697.83	655.43
G	Amount of Tax Paid.....	-	-	-	-	
H	Balance of Tax unpaid (Item F minus Item G).....	5128.72	776.28	999.19	697.83	655.43
I	Add: Penalties or Interest to 12/31/36	558.33	25% 194.07	22% 219.82	20% 139.57	16% 104.87
J	Total tax due the City of New York (Item H plus Item I).....	5787.05	970.35	1219.00	837.40	760.30

EXHIBIT "B"

CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Ste art & McGuire Inc. Agents Registration No. Wisc.
 Address 350 Fifth Avenue, NYC Local Law No. 20 of 1934, as amended
 Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant P. Amberg

Item No.	RECEIPTS FROM SALES AND SERVICES AS ADJUSTED	P E R I O D				Sch. No.
		12/10/34 to 12/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
1	Receipts from Sales (Not included in Items 2 or 3).	38814.00	49959.00	34891.50	32771.50	1
2	Receipts from installment sales.....					
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc.....					
4	Value of property purchased without tax used by you or in your business.....					
5	Total Receipts (Items 1 to 4 inclusive).....	38814.00	49959.00	34891.50	32771.50	
	Less: - Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale.....					
12	Receipts from sales of food products.....					
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1.00.....					
14	Receipts from sales to Federal, State and Municipal agencies.....					
15	Receipts from sales delivered outside the City...					
16	Receipts from sales to Semi-public institutions..					
17	Cash Discounts taken at time of sale and Trade Discounts.....					
18	Credits allowed on property accepted in part payment and intended for resale.....					
19	Credits allowed on property returned, cancelled sales and defective merchandise.....					
20	Other allowable deductions permitted by the law or regulations.....					
21	TOTAL ALLOWABLE DEDUCTIONS (Items 11 to 20 incl.)					
	Total Taxable Receipts as Adjusted (Item 5 minus 21).	38814.00	49959.00	34891.50	32771.50	

See Exhibit A for Computation of Tax.

Item numbers correspond with item numbers on return.

CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Exhibit "C"

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
Address A. H. DuGrenier Inc. Principal Local Law No. 20 of 1934, as amended
Period Audited 12/10/34 to 12/31/35

*Indicates Deduction

Accountant P. H. H. H. H.

Item No.	SUMMARY OF ADDITIONAL TAXABLE RECEIPTS	P E R I O D				Sen. No.
		12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	
	Add - Taxable Receipts not Reported:					
1	Receipts from sales.....	39814.00	49959.00	34891.50	32771.50	1
2	Receipts from installment sales.....					
3	Receipts from sales and services of gas, electricity, refrigeration, etc.....					
4	Value of property purchased without tax used by you or in your business.....					
5	Total taxable receipts not reported (Items 1 to 4 inclusive).....	39814.00	49959.00	34891.50	32771.50	
	Add - Deductions Disallowed:					
11	Receipts from sales for purpose of resale.....					
12	Receipts from sales of food products.....					
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1.00.....					
14	Receipts from sales to Federal, State and Municipal agencies.....					
15	Receipts from sales delivered outside the City.					
16	Receipts from sales to Semi-Public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts.....					
18	Credits allowed on property accepted in part payment and intended for resale.....					
19	Credits allowed on property returned, cancelled sales and defective merchandise.....					
20	Other deductions permitted by law or regulations					
21	Total Deductions Disallowed (Items 11 to 20 incl)					
	TOTAL ADDITIONAL TAXABLE RECEIPTS (Items 1 to 21 incl)	39814.00	49959.00	34891.50	32771.50	

See Exhibit A for Computation of tax

Item numbers correspond with Item numbers on return

Stewart & McGuire Inc. Agents
& A.H. deGrenier Inc. Principal

Schedule C-1
Misc.
12/10/34 to 12/31/35

P. Amberg, Acct.

	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
<u>Item 1 of Return</u>				
Receipts from sales				
Amount as reported	-	-	-	-
Add: Additional receipts from sales during taxable period, not reported (Note)	38814.00	49959.00	34891.50	32771.50
Amount as adjusted	<u>38814.00</u>	<u>49959.00</u>	<u>34891.50</u>	<u>32771.50</u>

Note:

Receipts from sales as per
your records.

EXHIBIT "A"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. None
& A.H. duRoi Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
 Address 350 Fifth Avenue, NYC and No. 31 of 1936
 Period Audited 1/1/36 to 9/30/36

*Indicates Deduction

Accountant P. Amberg.

Item No.		PERIOD AUDITED				Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36		
A	Tax Due the City of New York as reported (Item 10 of return).....	-	-	-		
B	Add - Tax - Two per centum of additional taxable receipts (Exhibit "C").....	563.20	758.28	264.21		
C						
D	Total tax (Items A to C inclusive).....	563.20	758.28	264.21		
	TOTAL					
E	Amount of tax-Two per centum of total receipts as adjusted (Exhibit "B")....	563.20	758.28	264.21		
F	Tax due the City of New York (Item D or E, whichever is greater).....	1585.69	563.20	758.28	264.21	
G	Amount of Tax Paid.....	-	-	-		
H	Balance of Tax unpaid (Item F minus Item G).....	1585.69	563.20	758.28	264.21	
I	Add: Penalties or Interest to 12/31/36	167.54	13% 73.22	10% 75.83	7% 18.49	
J	Total Tax due the City of New York (Item H plus Item I).	1753.23	636.42	834.11	282.70	

EXHIBIT "B"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
& A.H. duGrenier Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
 Address & 350 Fifth Avenue, NYC and No. 31 of 1936
 Period Audited 1/1/36 to 6/30/36
 Accountant P. Arberg

*Indicates Deduction

Item No.	RECEIPTS FROM SALES AND SERVICES AS ADJUSTED	P E R I O D			Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36	
1	Receipts from Sales (Not incl. in Items 2 or 3)	28159.95	37913.80	13210.70	
2	Receipts from installment sales.....				
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc.....				
4	Value of property purchased without tax used by you or in your business.....				
5	Total Receipts (Items 1 to 4 inclusive).....	28159.95	37913.80	13210.70	
	Less: Allowable Deductions (Items 11 to 20 incl)				
11	Receipts from sales for purpose of resale.....				
12	Receipts from sales of food products.....				
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1..				
14	Receipts from sales to Federal, State and Municipal agencies.....				
15	Receipts from sales delivered outside the City.				
16	Receipts from sales to semi-public institutions				
17	Cash Discounts taken at time of sale and Trade Discounts.....				
18	Credits allowed on property accepted in part payment and intended for resale.....				
19	Credits allowed on property returned, cancelled sales and defective merchandise.....				
20	Other allowable deductions permitted by the law or regulations.....				
21	TOTAL ALLOWABLE DEDUCTIONS (Items 11 to 20 incl)				
	Total Taxable Receipts as Adjusted (Item 5 minus 21).....	28159.95	37913.80	13210.70	

See Exhibit "A" for Computation of Tax. Item numbers correspond with item numbers on return.

EXHIBIT "C"

THE CITY OF NEW YORK - DEPARTMENT OF FINANCE - EMERGENCY REVENUE DIVISION
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Stewart & McGuire Inc. Agents Registration No. Misc.
& A.H. duGrenier Inc. Principal Local Laws No. 24 of 1934, No. 29 of 1935
Address 350 Fifth Avenue, NYC and No. 31 of 1936
Period Audited 1/1/36 to 9/30/36
Accountant P. Amberg, Acct.

*Indicates Deduction

Item No.	SUMMARY OF ADDITIONAL TAXABLE RECEIPTS	P E R I O D			Sch. No.
		1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36	
	Add - Taxable Receipts not Reported:				
1	Receipts from sales.....	28159.95	37913.80	13210.70	1
2	Receipts from installment sales.....				
3	Receipts from sales and services of gas, electricity, refrigeration, etc.....				
4	Value of property purchased without tax used by you or in your business.....				
5	Total taxable receipts not reported (Items 1 to 4 inclusive).....	28159.95	37913.80	13210.70	
	Add - Deductions Disallowed:				
11	Receipts from sales for purpose of resale.....				
12	Receipts from sales of food products.....				
13	Receipts from sales of food in restaurants where the charge per patron is less than \$1..				
14	Receipts from sales to Federal, State and Municipal agencies.....				
15	Receipts from sales delivered outside the City.				
16	Receipts from sales to semi-public institutions				
17	Cash Discounts taken at time of sale and Trade Discounts.....				
18	Credits allowed on property accepted in part payment and intended for resale.....				
19	Credits allowed on property returned, cancelled sales and defective merchandise.....				
20	Other deductions permitted by law or regulations				
21	Total Deductions Disallowed (Items 11 to 20 incl.)				
	TOTAL ADDITIONAL TAXABLE RECEIPTS (Item 5 plus 21).....	28159.95	37913.80	13210.70	

See Exhibit "A" for Computation of Tax. Item numbers correspond with item numbers on return.

Stewart & McGuire Inc. Agents &
A.H.duGrenier, Inc. Principal

Schedule C-1
Misc.
1/1/36 to 9/30/36

P.Amberg, Acct.

Item 1 of Return

Receipts from sales

Amount as reported

Add: Additional receipts from sales
during taxable period, not
reported (Note)

Amount as adjusted

1/1/36 to 3/31/36	4/1/36 to 6/30/36	7/1/36 to 9/30/36
-	-	-
<u>28159.25</u>	<u>37913.00</u>	<u>13210.70</u>
<u>28159.25</u>	<u>37913.00</u>	<u>13210.70</u>

Note:

Receipts from sales as per your
records:

[fol. 37]

February 23, 1937.

Department of Finance, City of New York, Emergency Revenue Division, 50 Lafayette Street, New York, New York.

Att.: Milton Solomon, Esq., Deputy Comptroller

Re: Stewart & McGuire, Inc., agents, A. H. DuGrenier, Inc., principal. General File

DEAR SIRs:

We have your thirty-day letter, dated January 25, 1937, addressed to Stewart & McGuire, Inc., agents, A. H. DuGrenier, Inc., principal, 350 Fifth Avenue, New York City, asserting a deficiency in New York City Sales Tax under Local Laws 24 of 1934, 29 of 1935, and 31 of 1936, in the total amount of \$5540.28, which was referred to us by your clients. The corporations to whom the communication was addressed desire that a hearing on the questions involved be obtained.

We, therefore, respectfully request that you designate a date for a hearing in this matter and advise us thereof.

Very truly yours, Hall, Cunningham, Jackson & Haywood.

CMP:aw.

[fol. 38]

February 23, 1937.

Department of Finance, City of New York, Emergency Relief Division, 50 Lafayette Street, New York, New York.

Attention: Milton Solomon, Esq., Deputy Comptroller

Re: Stewart & McGuire, Inc., Agents, A. H. DuGrenier, Inc., Principal. General File

DEAR SIRs:

Your thirty-day notice, dated January 25, 1937, addressed to Stewart & McGuire, Inc., Agents, A. H. DuGrenier, Inc., Principal, 350 Fifth Avenue, New York, New York, asserting a deficiency in New York City sales tax under Local Laws 24 of 1934, 29 of 1935, and 31 of 1936, in the total amount of \$5540.28, has been received by us.

We respectfully request that you grant us a hearing in this matter and advise our attorneys, Messrs. Hall, Cun-

ningham, Jackson & Haywood, of No. 22 East 40th Street, New York, New York, of the date set for such hearing.

Very truly yours, Arthur H. DuGrenier, Inc., by F. C. DuGrenier, President.

Registered Mail, ret. rect. requested.

FCD/IM.

[fol. 39] The City of New York, Department of Finance

Emergency Revenue Division,

50 Lafayette Street, New York City

Local Law 20 of 1934, as amended, 29 of 1935, 31 of 1936

Mar. 15, 1937.

Hall, Cunningham, Jackson & Haywood, Esqs., 22 East 40th St., New York City.

In Re: Registration No. M-99922. Name Stewart & McGuire, Inc. Address 350 Fifth Ave. N. Y. C. Tax Deficiency \$1149.80. Period 12/10/34 to 9/30/36

DEAR SIRs:

In reply to your request for a hearing with respect to the determination of the deficiency tax assessed against you pursuant to Local Law 20 of 1934, as amended, 29 of 1935, 31 of 1936, please be advised that a hearing will be held in Room 839 at 50 Lafayette Street, Borough of Manhattan, on Mar. 22, 1937 at 2.30 P. M., at which time you are requested to appear.

If you desire written testimony to be taken at said hearing, you are advised that you may appear in your own behalf or be represented by an attorney-at-law for that purpose. If you do not desire written testimony to be taken, you may appear in your own behalf or be represented by another person acting in your behalf. A power of attorney is required in all cases where the taxpayer does not appear in person.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 40] City of New York, Department of Finance
Emergency Revenue Division,
50 Lafayette Street, N. Y. C.

Feb. 16, 1938.

City Sales Tax, Final Determination, Misc.

Stewart & McGuire, Inc. Agents
A. H. DuGrenier, Inc., Principals
350 Fifth Avenue
New York, N. Y.

Local Law No.	Deficiency
24 of 1934	\$4058.64
29 of 1935	1599.45
31 of 1936	306.48
	<u>\$5964.57</u>

GENTLEMEN:

The Comptroller hereby determines that as a result of a hearing held at this office in connection with your tax liability to the City of New York for the period from December 10th, 1934 to September 30th, 1936 pursuant to Section 7 of Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, there is due and payable to the City of New York a deficiency of \$6203.27, as indicated below:

Local Law	Period Ended	Principal	Penalties	Total
24	2/28/35	\$776.28	\$302.75	\$1079.03
	5/31/35	999.18	359.68	1358.86
	8/31/35	697.83	237.26	935.09
	12/31/35	655.43	196.63	852.06
29	3/31/36	563.20	152.06	715.26
	6/30/36	758.28	182.00	940.28
31	9/30/36	264.21	58.48	322.69
	Total	\$4714.41	\$1488.86	\$6203.27

[fol. 41] This determination, which is final and irrevocable, is the result of an analysis of the testimony taken at the above-mentioned hearing. The testimony discloses that you are a vendor engaged in the sale of tangible personal property within the City of New York, upon the receipts from which you are required to collect the tax and to pay the same over to the City of New York. Payment of the tax due must be made to this office within thirty days of the date hereof, and this letter or a copy thereof should accompany your remittance. Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York, 50 Lafayette St., New York City.

In the event of your failure to pay the tax due, the Comptroller will issue a warrant in accordance with the provi-

sions of the law. Section 8 of Local Law No. 24 of 1934, No. 29 of 1935, and No. 31 of 1936 provides in part as follows:

"Whenever any vendor . . . shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law . . . the comptroller may issue a warrant directed to the sheriff of any county within the City of New York commanding him to levy upon and sell the real or personal property of the vendor . . . which may be found within the county, for the payment of the amount hereof, with any penalties, and the cost of executing the warrant . . ."

Very truly yours, (Signed) Samuel Orr, Special Deputy Comptroller.

[fol. 42]

March 12, 1938.

City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Samuel Orr, Special Deputy Comptroller

Re: Sales Tax—Local Law No. 24 of 1934, 29 of 1935, 31 of 1936.

DEAR SIR:

As attorney for A. H. DuGrenier, Inc., I hand you herewith its cheque in the amount of \$6,203.27, dated March 11, 1937, payable to the order of the City Collector.

This payment is made, under protest, in compliance with the demand contained in your letter of February 16, 1938, a copy of which is attached hereto, in which you notified the aforesaid corporation that the Comptroller's determination assessing a sales tax, with interest and penalties, in said amount, is declared final and irrevocable.

On behalf of A. H. DuGrenier, Inc., you are advised that this payment is not voluntarily made but is made under duress and in order to avoid additional penalties provided for under Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of 1936, and the issuance of a warrant against the property of said corporation, as stated in your said letter.

The aforesaid corporation, in making this payment, does not admit the validity or legality of the said assessment but, on the contrary, denies such validity and legality and

[fol. 43] that the same is authorized by said Local Laws or within the power of the City of New York to assess, being based on transactions in interstate commerce; and the aforesaid corporation expressly reserves all its rights to review the said determination of the Comptroller by certiorari or otherwise as may be permitted by law.

In behalf of the aforesaid corporation, I hereby make application for a refund of the said assessment amounting to \$6,203.27, payment of which is made herewith, and it is respectfully requested that the Comptroller give notice to the undersigned, as attorney for said corporation, of his determination on this application for refund.

Very truly yours,

(sgd) John H. Jackson.

Enclosures JJM :p.

[fol. 44] Testimony at Hearing Held Wednesday, May 12, 1937, at 10:00 A. M., in Room 823B, at 50 Lafayette Street, Borough of Manhattan, City of New York

Rubin Silverstein, Presiding.

Morton Baum, Asst. Corporation Counsel.

Philip Amberg, Accountant.

Arthur H. DuGrenier, Haverhill, Mass.

Appearances:

Hall, Cunningham, Jackson & Haywood, Attorney for Taxpayer, 22 East 40th Street, New York City.

Mr. J. H. Jackson, of Counsel.

Miss Blanche E. Bouchard, Treasurer, Arthur H. DuGrenier, Inc.

Mr. James A. Farrell, for Taxpayer.

Sales Tax

Local Law No. 24 of 1934

" " No. 29 of 1935

" " No. 31 of 1936

Period: December 10, 1934 to September 30, 1936

Mr. Silverstein: This is a hearing under Local Law No. 24 for the year 1934, No. 29 for the year 1935 and No. 31 for the year 1936, reviewing a determination made by the

Comptroller, dated January 25, 1937, in the following [fol. 45] amounts: Under Local Law No. 24—\$3,787.05 including penalties or interest—under Local Law No. 29—\$1,470.63 including penalties or interest—under Local Law No. 31—\$282.70. The assessment under Local Law No. 31 covers the period from July 1, 1936 to September 30, 1936, only.

MISS BLANCHE E. BOUCHARD, after being duly sworn, testified as a witness for the taxpayer as follows:

Direct examination.

By Mr. Jackson:

Q. Miss Bouchard, where do you live?

A. Haverhill, Mass.

Q. You are the treasurer of DuGrenier, Inc.?

A. Yes.

Q. That is a Massachusetts corporation?

A. That is right.

Q. Engaged in the business of manufacturing automatic vending machines?

A. Yes.

Q. What places of business does that corporation have?

A. Haverhill, Mass.

Q. Only one?

A. Just one.

Q. Has it any office in New York?

A. No.

Q. Has it any employee in New York?

A. No.

Q. Does it maintain any stock of goods in New York?

A. No.

Q. And at Haverhill there is a factory and the general office of the company?

A. That is right.

Q. And it has no other place of business?

A. No other.

[fol. 46] Q. With respect to the machines sold by your company in New York City, describe the general course of business, the usual process by which orders are received and filled.

A. Orders are sent up to us by Stewart & McGuire and we in turn accept the orders in Haverhill and fill them there.

Q. The order is sent by whom?

A. The customer.

Q. Is there anyone in New York authorized to accept an order or make any other contract?

A. No.

Q. I show you a form of conditional sales contract and ask you if that is the usual form of contract under which your company's goods are sold in New York City?

A. Yes, that is the form.

Mr. Jackson: I offer this in evidence.

Mr. Silverstein: No objection.

(Contract received in evidence and marked Taxpayers' Exhibit No. 1.)

Q. Is Stewart & Maguire a New York corporation—it is your sales agent?

A. Yes.

Q. Now, Taxpayers' Exhibit No. 1 appears to consist of a white, pink and yellow paper, will you describe what is done with each of those?

A. The white one is sent to be recorded.

Q. To be recorded in the public office?

A. That is right. The pink one we keep for our files with the notes and the yellow one is signed and sent to the customer.

Q. Now, Miss Bouchard, I understand you run this business?

A. Yes.

Q. You have full charge of all business transactions through the Haverhill office?

A. That is right.

[fol. 47] Q. Now, what does Stewart & Maguire get out of these transactions?

A. Sales commission.

Q. Have you any stock of goods anywhere except in Haverhill?

A. Just in Haverhill.

Q. It is impossible for you to fill orders except from stock of goods which you have at the factory at Haverhill?

A. That is right.

Q. Most of your sales, I understand, are made on conditional sales contracts?

A. The majority of them.

Q. You make sales on open account?

A. A few.

Q. When sales are made on open account you receive the orders and accept them in Haverhill in the same manner as the case of conditional sales?

A. That is right.

Q. From December 10, 1934 to September 30, 1935, were all of the sales which Arthur DuGrenier made for delivery to customers in New York City made in the manner which you have just described?

A. All made in this way.

Cross-examination.

By Mr. Baum:

Q. Do you have an agreement with Stewart & Maguire which constitutes them sales agents for your concern in the City of New York?

A. That is right.

Q. Is that evidenced by written agreement?

A. We have an old agreement made in 1931 which is not existent in that it covers prior models and not all our present models but we are working on the same basis as covered by the first agreement. We have no written agreement.

[fol. 48] Q. The original written agreement has expired and you are now operating under a continuation of that agreement? The written agreement expired and that you are now operating under an oral agreement carrying over all original terms?

A. That is right.

Q. The written agreement is the best evidence of what the parties agreed to but I presume you can tell us what the oral agreement is under which you operate?

A. We merely have an adjustment with them whereby they have the exclusive sale of certain products that we are making providing that they keep our factory running at capacity. That is the sum total, in return they have the selling agency of our merchandise.

Q. Do they have the exclusive selling agency in New York City?

A. They have the exclusive selling agency of the entire country as far as that is concerned.

Q. Describe their place of business here in New York, the location, size and other facts you know about it. How are they equipped to sell your product?

Mr. Jackson: Stewart & Maguire have a suite of offices with six or seven private offices in the Empire State Building devoted to the sale of products of this company as well as certain other products which come from other sources.

Miss Bouchard: That is right.

Q. Do they carry the name of your concern on their door?

A. No.

Q. They do not carry your name?

A. Not on the door.

[fol. 49] Q. Has the tax been paid by Stewart & Maguire on the transactions in question here?

A. Not that I know of.

Q. You do not contend that these above taxes have been paid twice, once by the Stewart & Maguire and once to you?

Q. Will you describe in detail the process by which these orders originate and how they get to you?

A. Well, they are mailed to us by Stewart & Maguire.

Q. And that is all you know about it?

A. That is all. I accept the order as final, on the basis of credit and so forth and pass and accept or reject it. If I accept it the order is filled.

Q. How do you check the credit of these concerns?

A. Either from past experience or through Dun & Bradstreet.

Q. This Exhibit No. 1 that is offered into evidence as purported to be an original sales contract between DuGrenier, Inc., and some buyer, is that what is mailed to you from Stewart & Maguire?

A. With the order, yes.

Q. That is mailed with the order?

A. Yes.

Q. Have you a sample copy of order that is sent to you from Stewart & Maguire?

A. No, I didn't bring one.

Q. The customers who give their orders to Stewart & Maguire and filling out the necessary papers which are for-

warded to you, do they know they are dealing with DuGrenier of Massachusetts?

A. They must, they make the notes and contract out to us and all the papers are made to us, and we do the collecting and so forth.

Q. I don't suppose you happen to know how the business is solicited by Stewart & Maguire, do you? Do they send salesmen out or do people come to their office?

[fol. 50] A. It is through salesmen. I don't know how they get their contacts or how they get the orders.

Q. Let's get this picture clearly. Consider certain buyers in the City of New York who are interested in the vending machines sold by you—they go to Stewart & Maguire to buy from Stewart & Maguire or to buy from you?

A. They buy our product but Stewart & Maguire is the agent that sells.

Q. Is your product a well-known product on the market?

A. Yes, in the vending machine industry it is very well known.

Q. It is the largest in the vending machine industry?

A. In the cigarette machine field, yes.

Q. In other words, the DuGrenier cigarette vending machine is a well-known product on the market?

A. That is right.

Q. Do you ever have people give you orders from New York City directly without giving them to Stewart & Maguire?

A. We do not sell at all except through Stewart & Maguire.

Q. If I were to write you from New York would you sell to me in New York?

A. No.

Q. In other words this arrangement you have is an exclusive sales agency?

A. That is right.

Q. As a matter of fact you can't sell anything yourself under the agreement you have with them?

A. No.

Q. Will you get a copy of the agreement which is now continued in effect in an oral agreement?

A. Yes.

Q. Do Stewart & Maguire ever take cash deposits from customers and forward it to you?

A. Sometimes, yes.

Q. In other words they start the transaction without being accepted by you?

[fol. 51] A. Subject to acceptance. If we reject it we refund. No order is ever accepted or considered final until we pass on it. Checks are made out to DuGrenier.

Q. Is this conditional sales contract entered into at the outset—at the same time as the order is made, both of which are forwarded to you at the same time?

A. Yes.

Q. How do you make deliveries from Haverhill, Mass., to customers in New York?

A. What do you mean?

Q. How do you make delivery of the machines?

A. Freight, truck, whichever way they specify.

Q. Do you ever send machines to Stewart & Maguire and have them deliver to the customer?

A. No, all contracts are consigned to the customer.

Q. Is it sent F. O. B. point of shipment?

A. F. O. B. Haverhill.

Q. Who pays the freight?

A. The customer.

Q. Is there anything about paying freight or F. O. B. in the original order or sales agreement?

A. There may be down at the bottom.

Q. Do Stewart & Maguire have any samples of machines on hand in their place of business which belong to you and which you let them have?

A. No, we bill them for samples.

Q. You bill them for samples? How does that work out?

A. Well, for instance, if I should send a sample down to a salesman regardless of where it is Stewart & Maguire gets billed on it. When the sample has served its purpose and returned to us it is credited against that memo.

Q. Don't they have a whole stock of samples?

A. They may have three or four in the New York office and each salesman has a sample.

Q. How do people who know your product know where to go to—how do they know to go to Stewart & Maguire?

A. The advertising that they do and also the contact [fol. 52] work and on each machine that is out it is marked the DuGrenier product and distributed by Stewart & Maguire. Stewart & Maguire distributor and DuGrenier manufacturer. Then they get their contacts.

Q. When does Stewart & Maguire get the commissions after the payments are made?

A. As the payments are made.

Q. Do they sometimes collect the payments for you and forward it to you?

A. Well, if a salesman should happen to be in a customer's office and the man handed him a check he would mail it to me. All ordinary transactions are handled through our office to the customers.

Q. How do you repossess yourself of the machine if there has been a default in one of the conditional installment payments?

A. How do we repossess? We don't have any cases of repossession. We threaten but I can't think of any case where we have actually gone in and repossessed.

Mr. Jackson: You had one at Worcester.

A. In Springfield we had one and that was turned over and we sold it to another customer. We have never taken a machine back for repossession.

Q. I suppose you know the agreement allows you to retain title until you get paid?

A. This contract is what makes us clinch the payments.

Mr. Jackson: Most everybody pays you.

A. That is it. We threaten repossession but outside of one or two actual cases over a period of eight or nine years we never repossessed.

[fol. 53] Q. Are some of those samples that are kept in the New York office sold directly?

A. Well occasionally they might sell a sample.

Q. They might sell—Stewart & Maguire?

A. Yes, most of them are returned as new models are brought out. Once in a while a salesman might sell his sample.

Q. Is it possible for a buyer in New York City to come to Stewart & Maguire, see the sample and buy the sample from Stewart & Maguire and have money forwarded to you?

A. No.

Q. What is the procedure if one of the samples is sold?

A. If a man is in a hurry they might give him a sample. We credit Stewart & Maguire and bill the account for the full list price and then we in turn replace that sample with another one.

Q. Who is payment made to?

A. The billing is all through DuGrenier.

Q. Suppose I wanted to pay for it in cash could I do so?

A. Well if you walked in and paid cash they would probably accept the payment.

Q. Then do they forward the cash money to you or do they retain that cash money?

A. Well if it was cash they might send me my equity. They would send a check if it was a check because it would be made out to me.

Q. What is the amount of commission from you?

A. It varies from thirty to forty per cent.

Q. When these payments are made to you from individual customers how do you turn over the payment to Stewart & Maguire for the forty per cent share?

A. We make out a weekly commission statement and all payments we have received up to that date of the statement, we give him his share that is coming to him and give him one check for the full amount of receipts that week.

[fol. 54] Q. So that on these machines you sell in New York City neither Stewart & Maguire nor yourself pays over any Sales Tax to the City of New York?

A. No, I am speaking for myself. I don't know about Stewart & Maguire. As far as I know they did not. How that is handled I don't know, I have nothing to do with their bookkeeping here.

Q. Are those machines stock machines or made to order?

A. Made to order. That is we take them off of the line and ship them out.

Q. Is there a specific construction or set-up or design that is demanded by the customer in sending the order to you or are your machines standard product?

A. Standard product. The only thing optional to a customer is the color. Outside of that they are standard.

Mr. Silverstein:

Q. Are Stewart & Maguire furnished with a catalog of the machines which you manufacture?

A. They make their own catalog.

Q. They make their own catalog?

A. That is right.

Q. Have they a catalog and price list of each machine and each machine's attachments?

A. That is right.

Q. Are they reimbursed by you for the cost of the catalogs?

A. No, they assume all sales expense.

Hearing closed subject to receipt by the Comptroller of the written agreement between Stewart & Maguire and Arthur H. DuGrenier, referred to in witness's testimony and also subject to the right of the Comptroller to cross-examine witnesses with respect to information contained in the contract if necessary.

(Here follows 1 photolithograph, side folio 55-56)

TAXPAYERS EXHIBIT NO.1 (In Evidence)

(ORIGINAL)

(IN TRIPLICATE)

CONDITIONAL SALES CONTRACT

THIS AGREEMENT, made this _____ day of _____, 193____, between
 ARTHUR H. DuGRENIER, Inc., seller, and _____ Buyer,
 of _____

WITNESSETH: Seller agrees to sell and Buyer agrees to buy
 serial numbered as follows:

for the total purchase price of (\$ _____) lawful money of the United States, payable as follows, to wit:
 (\$ _____) in cash, upon signing of this contract, and (\$ _____) cash on delivery of said
 Machines. The balance is payable in _____ MONTHLY NOTES, dated this _____ day of _____, 193____

each for the principal sum of (\$ _____), payable to the order of ARTHUR H. DuGRENIER, Inc., with interest
 at the rate of SIX per cent per annum. The first of said notes to be paid with interest one month from date thereof, and
 thereafter one of said notes is to be paid promptly with interest each month until all of said notes are paid in full with interest
 thereon.

It is specifically agreed that the Buyer will pay all taxes, license fees and assessments whatsoever levied or charged
 against said Machines, that he will not permit same to be removed from his possession nor create or permit to be created any
 lien or encumbrance against same for any reason whatsoever. Buyer also agrees not to sell, lease, mortgage or otherwise dis-
 pose of said Machines or take same out of the territory hereinafter set forth during the life of this contract, nor to assign this
 contract or any rights hereunder during the life of same.

In event Buyer fails or neglects to comply with any of the terms, covenants or conditions of this contract, or to make
 any of the payments provided for herein when due, or shall become financially involved or be adjudicated a bankrupt, then the
 Seller, at their option and without notice to Buyer, may elect to declare the whole purchase price immediately due and payable,
 or the Seller may without notice to Buyer, declare this contract terminated and without demand first made, immediately take
 possession of said Machines and hold same discharged from any further liability under this contract; or may retake possession
 of said Machines and sell same to apply the estimated value thereof upon the amounts due under this contract and recover the
 balance, if any, from Buyer. In any of such events, all payments theretofore made belong absolutely to Seller.

Until Buyer has fully complied with all the terms and conditions of this contract, and made all payments in full as
 herein provided, said Machines shall belong to and title to same shall remain in Seller, and until said Machines have been paid
 for in full, Buyer agrees to keep Seller informed as to the exact location of each Machine purchased under this contract. Upon
 full compliance with the terms and conditions of this contract and full payment hereunder, Seller will give a clear bill of sale
 to said Machines to Buyer and convey title to him.

In event of default, as above specified, whereunder Seller shall elect to retake possession of said Machines, Buyer
 agrees to pay Seller any expenses of Seller in recovering such possession of said Machines, or in collecting any unpaid balance
 under this contract, including in either event reasonable attorney's fees. Time and all of the above terms, conditions and
 covenants are hereby declared to be of the essence of this contract, and acceptance by Seller of any payment hereunder after
 same is due shall not constitute a waiver by them of any of the provisions of this contract.

IN WITNESS WHEREOF, the parties hereto have placed their hands and seals in duplicate this
 day of _____, 193____.

ARTHUR H. DuGRENIER, Inc.
 241 Winter Street, Haverhill, Mass.

This Contract is not valid until countersigned by an
 official of the ARTHUR H. DuGRENIER, Inc.

By

Representative

Countersigned

Buyer

[fol. 57] IN SUPREME COURT OF NEW YORK

OPINION OF MR. JUSTICE MILLER

(Reported in 99 N. Y. L. J., Page 1767, April 12, 1938)

A. H. DuGrenier, Inc. v. McGoldrick—Motion is granted to the extent of transferring the proceeding to the Appellate Division (*Compagnie Generale Transatlantique v. Taylor*, N. Y. L. J., December 16, 1937, Special Term, Part I; *Matter of Foy Productions, Lim. v. Graves*, 164 Misc. 479). Settle order.

IN SUPREME COURT OF NEW YORK

STIPULATION DISPENSING WITH PRINTING OF CERTAIN MATTER

It is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the printing of the undertaking herein, approved by Mr. Justice McLaughlin on March 14, 1938, and filed with the respondent on the same date, be dispensed with and omitted from the record.

Dated, May 25, 1938.

Hall, Cunningham, Jackson & Haywood, Attorneys
for Petitioners. William C. Chanler, Corporation
Counsel of the City of New York, Attorney for
Respondent.

[fol. 58] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, It is Hereby Stipulated that the foregoing papers consist of true and correct copies of the petition and order to show cause and order transferring the proceeding to the Appellate Division, First Department, and the answer and certified transcript and all the papers upon which the Comptroller of the City of New York acted in making the determination to be reviewed in this proceeding now on file in the office

of the Clerk of the County of New York, and certification thereof by the Clerk of said County is hereby waived.

Dated, May 25, 1938.

Hall, Cunningham, Jackson & Haywood, Attorneys
for Petitioners. William C. Chanler, Corporation
Counsel of the City of New York, Attorney for
Respondent.

[fol. 59] IN SUPREME COURT OF NEW YORK, NEW YORK
COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

Sirs:

Please take notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938 (a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939), annulling the determination of the respondent and directing the respondent to make refund to the petitioners herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March 12, 1938, and the respondent appeals from each and every part of said Appellate Division [fol. 60] order as well as from the whole thereof.

Further take notice that the respondent also appeals to the Court of Appeals from the judgment entered upon the aforesaid Appellate Division order in the office of the Clerk of the County of New York on or about the 7th day of January, 1939, wherein it is, among other things, adjudged that the petitioners recover of the respondent the sum of \$172.49 costs, and the respondent appeals from each and

every part of said judgment as well as from the whole thereof.

Dated, February 6, 1939.

Yours, etc., William C. Chanler, Corporation Counsel,
Attorney for Respondent, Office and Post Office
Address, Municipal Building, Borough of Man-
hattan, New York City.

To: Hall, Cunningham, Jackson & Haywood, Esqs., At-
torneys for Petitioners, 22 East 40th Street, Borough of
Manhattan, New York City.

Archibald R. Watson, Esq., Clerk of New York
County.

[fol. 61] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

Present: Hon. Francis Martin, Presiding Justice, Hon.
Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward
S. Dore, Hon. Joseph M. Callahan, Associate Justices.

In the Matter of the Application of A. H. DuGrenier, Inc.,
Principal, and STEWART & McGUIRE, INC., Agent Peti-
tioners,

for an order against

JOSEPH D. MCGOLDRICK; as Comptroller of the City of New
York, to review a determination, Respondent

ORDER—Dec. 16, 1938

The above-named A. H. DuGrenier, Inc., principal, and
Stewart & McGuire, Inc., agent petitioners, having hereto-
fore obtained an order bearing date the 18th day of April,
[fol. 62] 1938, to review a determination made by the
respondent, Joseph D. McGoldrick, as Comptroller of the
City of New York, assessing a tax deficiency pursuant to
Local Laws No. 24 of 1934, No. 29 of 1935 and No. 31 of
1936, for the period commencing December 10, 1934, and
ending September 30, 1936, in the aggregate amount of
\$6,203.27, comprising principal in the sum of \$4,714.41 and
interest and penalties in the sum of \$1,488.86; and a return
to said order having been made, and the issues raised

having come on for a hearing before this Court on the 2nd day of November, 1938, and the said appeal having been submitted by Mr. John H. Jackson, of Counsel for the petitioners, and by Mr. William F. Young, of Counsel for the respondent, and due deliberation having been had thereon,

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is unanimously

Ordered, that the said determination of Joseph D. McGoldrick, as Comptroller of the City of New York, be, and the same hereby is, unanimously annulled, with \$50.00 costs and disbursements to be taxed; and it is further unanimously

Ordered, that Joseph D. McGoldrick as Comptroller of the City of New York, be and he is hereby directed to make refund to the petitioners of the tax and penalties paid in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment.

Enter

F. M.

[fol. 63] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

A. H. DuGrenier, Inc., 630 Fifth Ave., N. Y. C.

Stewart & McGuire, Inc., 34-54—37th St., L. I. C., N. Y.

Joseph D. McGoldrick, as Comptroller of the City of New York, Municipal Bldg., N. Y. C.

In the Matter of the Application of A. H. DuGRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent Petitioners,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Respondent

JUDGMENT ENTERED ON ORDER OF THE APPELLATE DIVISION

An order bearing date April 18, 1938, having been made and entered by this Court, granting the petitioners' motion for a review of the determination made by Joseph D. McGoldrick, as Comptroller of the City of New York, to the extent of transferring the above proceeding to the Appellate

Division of the Supreme Court, First Department, for such review of the determination as aforesaid; and the issues raised having come on for hearing before the Appellate Division of the Supreme Court, First Department; and the said determination of Joseph D. McGoldrick, as Comptroller of the City of New York, having been unanimously annulled, with \$50.00 costs and disbursements to be taxed; and the said Joseph D. McGoldrick, as Comptroller [fol. 64] of the City of New York, having been directed to make refund to the petitioners of the tax and penalties paid in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment; and an order to such effect having been rendered by the said Appellate Division of the Supreme Court, First Department, on the 16th day of December, 1938, and a certified copy of said order having been filed in the office of the Clerk of the County of New York on the 5th day of January, 1939, and the costs and disbursements of the said petitioners having been duly taxed at the sum of \$172.49,

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for the petitioners, it is

Ordered and Adjudged, that the determination of Joseph D. McGoldrick, as Comptroller of the City of New York, heretofore made herein, be and the same hereby is unanimously annulled; and it is

Further Ordered and Adjudged, that Joseph D. McGoldrick, as Comptroller of the City of New York, be and he is hereby directed to make refund to the petitioners of the tax and penalties paid herein in the aggregate sum of \$6,203.27, with interest thereon from March 12, 1938, the date of payment thereof; and it is

Further Adjudged, that the petitioners, A. H. DuGrenier, Inc., and Stewart & McGuire, Inc., recover of the respondent, [fol. 65] Joseph D. McGoldrick, as Comptroller of the City of New York, the sum of \$172.49 for the costs and disbursements as taxed herein.

Judgment signed and entered this 7th day of January, 1939.

Archibald R. Watson, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

(Reported in 101 New York Law Journal 2195 on December 17, 1938)

Determination unanimously annulled, with \$50 costs and disbursements to the petitioners, on the authority of *Matter of National Cash Register Co. v. Taylor* (276 N. Y. 208); *Matter of United Artists Corp'n v. Taylor* (248 App. Div. 207, aff'd: 273 N. Y. 334) and also *Matter of Felt & Terrant v. McGoldrick* (254 App. Div. 246); *Matter of Sears, Roebuck & Co. v. McGoldrick* (254 App. Div. 669); *Matter of Compagnie Generale Transatlantique v. McGoldrick* (254 App. Div. 237, aff'd 279 N. Y. 192, decided November 29, 1938). The comptroller is directed to make refund to petitioner of the tax and penalties paid with interest thereon from the date of payment. Settle order on notice.

[fol. 66]

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order and opinion of the Appellate Division, the judgment entered on the order of the Appellate Division, and all papers upon which said order, opinion and judgment are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof, pursuant to Section 170 of the Civil Practice Act or otherwise, is hereby waived.

Dated, New York, March 14, 1939.

William C. Chanler, Corporation Counsel, Attorney
for Defendant-Appellant. Hall, Cunningham,
Jackson & Haywood, Attorneys for Petitioners-
Respondents.

[fol. 67] At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 7th day of July, 1939.

Present: Hon. Samuel I. Rosenman, Justice.

6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and STEWART & McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

The above named defendant-appellant having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938, a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939, annulling the determination of the defendant-appellant and directing the defendant-appellant to make refund to the petitioners-respondents herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March [fol. 68] 12, 1938, and the said defendant-appellant having appealed also from the judgment entered in the office of the Clerk of the County of New York on or about the 7th day of January, 1939, based on the aforesaid order of the Appellate Division, adjudging that the petitioners-respondents recover of the defendant-appellant the sum of \$172.49 for costs and disbursements as taxed therein; and the said appeal having been duly submitted at the Court of Appeals and, after due deliberation, the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Hall, Cunningham,

Jackson & Haywood, attorneys for the petitioners-respondents, it is

Ordered, that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter, S. I. R., J. S. C.

[fol. 69] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY
OF NEW YORK

6279/1938

In the Matter of the Application of A. H. DUGRENIER, INC.,
Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
York, to review a determination, Defendant-Appellant

A. H. DuGrenier, Inc., 630 Fifth Avenue, N. Y. C. Stewart
& McGuire, Inc., 36-07 35th Ave., Long Island City, N. Y.
Joseph D. McGoldrick, as Comptroller of the City of New
York, Municipal Bldg., N. Y. C.

An order bearing date April 18, 1938, having been made and entered by this Court, granting the petitioners-respondents' motion for a review of the determination made by Joseph D. McGoldrick, as Comptroller of the City of New York, to the extent of transferring the above proceeding to the Appellate Division of the Supreme Court, First Department, for such review of the determination as aforesaid; and the said Appellate Division having made an order dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 28th day of December, 1938, a certified copy of which order was duly filed in the office of the Clerk of the County of New York on or about the 5th day of January, 1939, annulling the determination of the defendant-appellant and directing the defendant-appellant to make refund to the petitioners-respondents herein of the tax and penalty in the aggregate sum of \$6,203.27 with interest thereon from March 12, 1938, [fol. 70] and a judgment having been entered thereon in the office of the Clerk of the County of New York on or about the 7th day of January, 1939 adjudging that the petitioners-

respondents recover of the defendant-appellant the sum of \$172.49 costs; and the defendant-appellant having appealed from said order and judgment to the Court of Appeals, and the said Court of Appeals having forwarded its remittitur, filed herein on the 7th day of July, 1939, by which it appears that the said Court of Appeals has affirmed the said order of the Appellate Division with costs, and has given judgment accordingly, and has remitted the order of said Court of Appeals to this Court to be enforced according to law; and this Court having by an order duly entered herein on the 7th day of July, 1939, ordered that said order be made the order of this Court; and the petitioners-respondents' costs having been duly taxed at the sum of \$108.30.

Now, on motion of Hall, Cunningham, Jackson & Haywood, attorneys for petitioners-respondents, it is

Adjudged, that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is

Further Adjudged, that the said order of the Appellate Division be and the same is hereby affirmed with costs, and that the petitioners-respondents, A. H. DuGrenier, Inc. and Stewart & McGuire, Inc., recover of the defendant-appellant, Joseph D. McGoldrick, as Comptroller of the City of New York, the sum of \$108.30 for their costs and disbursements as taxed herein.

Judgment signed and entered this 13th day of July, 1939.

Archibald R. Watson, Clerk.

Addresses on the front page.

[fol. 71] SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of A. H. DuGrenier, Inc.,
Principal, and Stewart & McGuire, Inc., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to Review a Determination, Defendant-Appellant

STATE OF NEW YORK,
County of New York, ss:

John A. Leddy, being duly sworn, says that he is the Assistant Chief Clerk in the office of the Corporation Counsel

of the City of New York, the attorney for the defendant-appellant in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John A. Leddy.

Sworn to before me, this 11th day of October, 1939.
 Frank Surowitz, Notary Public, Bronx County.
 Bronx Co. Clks. No. 237, Reg. No. 1325. Kings
 Co. Clks. No. 334, Reg. No. 623. N. Y. Co. Clks. No.
 950, Reg. No. 88630. Queens Co. Clks. No. 557, Reg.
 No. 253. My Commission Expires March 30, 1940.

[Reg. 230, Fol. 416]

[fol. 72]. COURT OF APPEALS, STATE OF NEW YORK

No. 1517

In the Matter of the Application of A. H. DUGRENIER, INC.,
 Principal, and STEWART & MCGUIRE, INC., Agent, Peti-
 tioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New
 York, to Review a Determination, Defendant-Appellant

NOTICE OF MOTION TO AMEND THE REMITTITUR OF THIS COURT
 OR FOR ALTERNATIVE RELIEF, WITH SUPPORTING AFFI-
 DAVIT

Dated, New York, N. Y., September 20, 1939.

William C. Chanler, Corporation Counsel, Attorney
 for Defendant-Appellant. William C. Chanler,
 Sol Charles Levine, Morris L. Heath, of Counsel.

[27164]

[fol. 73] NOTICE OF MOTION, COURT OF APPEALS, STATE OF
NEW YORK

In the Matter of the Application of A. H. DuGRENIER, INC.,
Principal, and STEWART & McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New
York, to Review a Determination, Defendant-Appellant

SIRS:

Please take notice that upon the annexed affidavit of William C. Chanler, verified the 20th day of September, 1939, the papers on appeal, and all the proceedings heretofore had herein, the undersigned will move this Court at a session thereof to be held at the Court of Appeals Hall, Albany, New York, on Monday, the 25th day of September, 1939, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting reargument of the appeal herein, and upon such reargument being granted, reversing the order appealed from;

[fol. 74] (c) or, in the alternative, in the event the order appealed from be not reversed, amending the remittitur of this Court, dated June 21, 1939, by inserting after the words "be and the same hereby is affirmed with costs", the words, "upon the sole ground that the City sales tax law as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States";

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 20, 1939.

Yours, etc., William C. Chanler, Corporation Counsel of the City of New York, Attorney for Defendant-Appellant, Office and P. O. Address: Municipal Building, Borough of Manhattan, City of New York. To: Hall, Cunningham, Jackson & Haywood, Esqs., Attorneys for Petitioners-Respondents, 22 East 40th Street, Borough of Manhattan, City of New York. John Ludden, Esq., Clerk of the Court of Appeals.

[fol. 75] COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of A. H. DU GRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents, for an Order Against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK,

County of New York, ss.:

William-C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution of the New York City sales tax, imposed by Local Law No. 20 of 1934, as amended, Local Law No. 29 of 1935 and Local Law No. 31 of 1936, as applied to petitioners-respondents' sales in New York City of automatic vending machines shipped from [fol. 76] the Du Grenier company's plant in Massachusetts.

3. On June 21, 1939, this Court affirmed without opinion the order of the Appellate Division, First Department, which invalidated the City sales tax as applied to these sales on the ground that it constituted a burden on interstate commerce (281 N. Y. mem. p. 32). The remittitur affirming the order of the Appellate Division, First Department, directed that judgment be entered in accordance therewith and such judgment was entered on July 13, 1939.

4. The appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Reed, dated September 7, 1939, the City's time to file with the United States Supreme Court a petition for certiorari was extended for a period of 30 days from September 24, 1939.

5. On June 5, 1939, the Supreme Court of the United States granted the request of this appellant that writs of certiorari be issued to review previous decisions of this Court in connection with the validity of the New York City sales tax under the Commerce Clause in Matter of Com-

pagnie Generale Transatlantique v. McGoldrick, 279 N. Y. 192 (1938), certiorari granted 307 U. S. —, and in *Matter of Felt & Tarrant Mfg. Co. v. McGoldrick*, 279 N. Y. 678 (1938), certiorari granted 307 U. S. —. These cases are now pending on the docket of the United States Supreme Court.

6. Prior to that date this appellant had requested this Court to amend the remittiturs in those two proceedings to make it clear that the decision in favor of the taxpayer was based solely on the ground that the Federal Constitution had [fol. 77] been contravened; and this Court had granted such request, inserting in each case the words "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (article 1, section 8, clause 3) of the Constitution of the United States". 280 N. Y. 688, 691.

7. In the two earlier cases of *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208 (1937) and *Matter of West Publishing Co. v. Taylor*, 276 N. Y. 535 (1937), the petitions of the City for certiorari were denied 303 U. S. 656 (1938). It is likely that the denial in those cases was based on the Supreme Court's view that they did not present an exclusively federal question. At least one commentator has taken this position and has stated that certiorari was denied in those cases because of the existence of a state question under the state enabling act. Lockhart, *The Sales Tax in Interstate Commerce*, 52 *Harvard Law Review* 617, 619, note 14 (1939). The granting of certiorari in the *French Line* and *Felt & Tarrant* cases after this Court had amended the remittitur lends support to this view.

8. It is extremely important to the appellant that there be no doubt on the part of the Supreme Court that the case at bar was decided upon exclusively federal grounds. This case involves a question of great public importance. Unless the way is left open for the granting of certiorari in this case, the City may be in the position of prevailing over the *French Line* and *Felt & Tarrant* companies in the United States Supreme Court, yet left without redress against the similarly situated taxpayer here.

9. There is no difference between this case and the *French Line* and *Felt & Tarrant* cases in respect to the existence [fol. 78^a] of an enabling act, or other state question. In

those cases, this Court amended the remittitur so as to show that an exclusively federal question was the basis of its decision.

The citation by the Appellate Division (255 App. Div. 961) of the National Cash Register case (*supra*) possibly suggests that it had in mind a state question, which had been discussed in its opinion in that case (252 App. Div. 90). As this Court, in affirming, wrote no opinion, it is incumbent upon us to move to eliminate any such suggestion by the amendment of the remittitur.

Wherefore, your deponent prays that reargument be granted, and upon such reargument, that the order appealed from be reversed; or, in the alternative, that the remittitur be amended to show that the decision raised a federal question under the Commerce Clause, and no other questions.

William C. Chanler.

Sworn to before me this 20th day of September, 1939.

Daniel W. Kingston, Notary Public, Kings County;
N. Y. Co. Clerk's No. 104, Reg. No. 0-K-64; Bronx
Co. Clerk's No. 3, Reg. No. 5-K-40; Kings Co.
Clerk's No. 12, Reg. No. 117; Queens Co. Clerk's
No. 69, Reg. No. 636; Certificate Filed in Richmond
County; Commission Expires Mar. 30, 1940.

[fol. 79] IN COURT OF APPEALS

STATE OF NEW YORK:

At a Court of Appeals for the State of New York held at Court of Appeals Hall in the City of Albany, on the twenty-seventh day of September, A. D. 1939.

Present, Hon. Frederick E. Crane, Chief Judge, Presiding.

In the Matter of The Application of A. H. DU GRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners-Respondents, For an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

A motion for a reargument of or to amend the remittitur in the above cause having been heretofore made upon the

part of the defendant-appellant herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States."

And the Supreme Court of the State of New York, County of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 80]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of June in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said court.

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding.

John Ludden, Clerk.

Remittitur, June 21, 1939.

[fol. 81] In the Matter of the Application of A. H. DUGRENIER, INC., Principal, & ano., &c., for an Order
ag'st.

JOSEPH D. MCGOLDRICK, as Comptroller of The City of New York, &c.

Be It Remembered, That on the 10th day of April in the year of our Lord one thousand nine hundred and thirty-nine, Joseph D. McGoldrick, as Comptroller of The City of New York the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and

filed in the said Court a Notice of Appeals and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And A. H. DuGrenier, Inc., Principal, and another &c. the respondents in said cause, afterwards appeared in said Court of Appeals by Hall, Cunningham, Jackson & Haywood, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals, this cause having been submitted by counsel for the respective parties, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 82] And afterwards, to wit, on the 27th day of September 1939 an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 21, 1939.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 83] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the New County Court House in the Borough of Manhattan, City of New York, on the 11 day of October, 1939.

Present: Hon. Julius Miller, Justice.

In the Matter of the Application of A. H. DUGRENIER, INC., Principal, and STEWART & McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

The defendant-appellant having moved at the Court of Appeals for a reargument of the appeal herein or to amend the remittitur of the Court of Appeals in the above cause, and the Court of Appeals, in an order dated the 27th day of September, 1939, having ordered that the said motion for reargument be denied and that the remittitur be amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States",

Now on motion of William C. Chanler, Corporation Counsel of the City of New York, attorney for the defendant-appellant, it is

[fol. 84] Ordered that the said order of the Court of Appeals amending the said remittitur be and the same hereby is made the order of this Court.

Enter, J. M., J. S. C.

[fol. 85] COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of A. H. DUGRENIER, INC., Principal, and STEWART A. McGUIRE, INC., Agent, Petitioners-Respondents,

for an order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, to review a determination, Defendant-Appellant

I, Archibald R. Watson, Clerk of the Supreme Court of the State of New York, County of New York, and Clerk

of the County of New York, do hereby certify that the foregoing consists of a true, full, correct and complete copy of the printed record on appeal to the Court of Appeals of the State of New York in the above entitled proceeding upon which the said Court of Appeals acted and which has been certified to this Court by the said Court of Appeals, and a true, full, correct and complete copy of the following papers, to wit: the order of the Supreme Court entered on the remittitur from the Court of Appeals; the judgment of the Supreme Court entered on the remittitur from the Court of Appeals; the affidavit of no opinion by the Court of Appeals; the notice of motion for reargument and to amend the remittitur of the Court of Appeals, with the supporting affidavit; the order of the Court of Appeals upon the granting of the motion to amend the remittitur; the amended remittitur from the Court of Appeals and the order of the Supreme Court making the order and amended remittitur of the Court of Appeals the order of the Supreme Court, all of which are on file in this office.

In Witness Whereof I have hereunto set my hand and affixed my seal the 13th day of October, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, Petitioner,

against

A. H. DUGRENIER, INC.

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It Is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from September 24, 1939.

Dated, this 7th day of September, 1939.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

[fol. 87] [Endorsed:] File No. 43,881. New York Supreme Court. Term No. 474. Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1939. Term No. 474 O. T. 1939.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted, and the case is assigned for argument immediately following No. 45.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 4 . October Term, 1939

**JOSEPH D. McGOLDRICK, Comptroller of
the City of New York.**

Petitioner.

against

A. H. DUGRENIER, INC., Principal, and
STEWART & MCGUIRE, Inc., Agent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
AND BRIEF IN SUPPORT THEREOF.**

Application of Commerce Clause to consumers' sales tax on sales in New York City of vending machines shipped from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that purchases of vending machines made in the city are in interstate commerce merely because seller for its own convenience chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing vending machines outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunity and fostering tax avoidance and evasion. Conflict between decisions of State courts.

October 17, 1939.

WILLIAM C. CHANLER,
PAXTON BLAIR,
✓ SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

MORRIS L. HEATH,
of Counsel.

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Supreme Court of the United States

No. . October Term, 1939

JOSEPH D. MCGOLDRICK, Comptroller of
the City of New York,

Petitioner,

against

A. H. DUGRENIER, INC., Principal, and
STEWART & MCQUIRE, INC., Agent.

PETITION FOR WRIT OF CERTIORARI TO

SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved and seeks review of a decision of the Court of Appeals of the State of New York (Judge FINCH dissenting), holding that by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondents' sales of vending machines to New York City purchasers for consumption. The federal question was, and the Court so stated in its remittitur, the sole question involved in its decision.

2. The present case is a companion case to *Matter of Berwind-White Coal Mining Company v. McGoldrick*, 281 N. Y. mem., p. 34 (1939), decided on the same date, where the tax was likewise invalidated. A petition for certiorari

Petition

in that case is being presented together with the present petition.

3. This case involves substantially the same question as is involved in *McGoldrick v. Compagnie Générale Transatlantique*, 307 U. S. (June 5, 1939), and *McGoldrick v. Felt & Tarrant Mfg. Co.*, 307 U. S. (June 5, 1939), in which writs of certiorari were granted by this Court on the application of this petitioner, and which are now Nos. 44 and 45, respectively, on the current docket of this Court. On October 9, 1939, the Court granted the request of the City that the hearing of those cases be deferred until December 4th or such time as the petitions for certiorari in this case and the companion *Berwind-White* case shall have been acted upon.

Jurisdiction and Timeliness.

4. The petition for certiorari is made under 28 U. S. C. A., § 344, subd. (b); the Court has jurisdiction to grant the writ: *Minnesota v. Blasius*, 290 U. S. 1 (1933); *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (1939); *McGoldrick v. Compagnie Générale Transatlantique* and *McGoldrick v. Felt & Tarrant Mfg. Co.*, both *supra*.

5. A final order and judgment were entered in the office of the County Clerk of New York County, on July 13, 1939 upon the remittitur of the Court of Appeals filed on July 7, 1939, and upon the order of the Supreme Court of the State of New York, dated July 7, 1939, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice REED, dated September 7, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of thirty days from September 24, 1939. On September 25, 1939, petitioner duly filed with the Court of Appeals a motion for

Petition

reargument and to amend the remittitur. On September 27, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend the remittitur, 281 N. Y., mem. p. 93. On October 11, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated September 27, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice REED's order of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on September 27, 1939, and the resultant necessity of entering new orders in the Court where the record lies.

6. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection to the tax was raised by the taxpayers (respondents here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 44-54). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 9). The Appellate Division sustained the objection and annulled petitioner's determination. (R. 65). Upon appeal to the Court of Appeals the taxpayers further urged this objection. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

"upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y. mem. p. 93.)

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The Statute the Validity of Which Is Involved.

7. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of Local Laws of the Cities in the State for 1934 as No. 21); as amended by Local Law No. 24 of 1934 (officially printed at p. 164 as No. 25), Local Law No. 29 of 1935 (officially printed at p. 147 of Local Laws of the Cities in the State for 1935), and Local Law No. 31 of 1936 (officially printed at p. 145 of Local Laws of the Cities in the State for 1936), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805 as amended by Laws of New York of 1935, ch. 601, p. 1229 and as amended by Laws of New York of 1936, ch. 414, p. 1095. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local laws are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below.

8. The decision of the Court of Appeals is reported in 281 N. Y., mem. p. 32, the memorandum opinion of the Appellate Division is reported in 255 App. Div. 961 and is printed as Appendix C. The decision of the Court of Appeals in the companion *Berwind-White* case is in 281 N. Y., mem. p. 34, which affirmed 255 App. Div. 961.

Summary Statement of the Matter Involved.

9. The City sales tax law in question imposes a non-discriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being paid

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and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as, a sale "for any purpose other than for resale". The respondents' sales which were the subject of the tax were made in a manner described more fully in the subjoined brief. The contracts were made, signed and executed within the City of New York and called for the sale and delivery of vending machines in New York City. Respondents fulfilled these contracts by shipments from the DuGrenier plant in Massachusetts.

Questions Presented.

10. The questions presented in this case are as follows:
 - (a) Does the New York City tax as applied to respondents' sales of vending machines impose an unconstitutional burden on interstate commerce?
 - (b) Do respondents' sales of vending machines "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wilou Corp. v. Pennsylvania*, 294 U. S. 169, 174 (1935)?

Assignment of Errors.

11. It is submitted that the Court of Appeals erred:
 - (a) In holding that the New York City sales tax as applied to the respondents' sales constituted an unconstitutional burden on interstate commerce.
 - (b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or

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otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra*.

- (c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ.

12. The reasons relied on by petitioner for allowance of the writ are as follows:

(a) This case involves a slight variation on the question involved in the *Compagnie Générale Transatlantique* and *Felt & Tarrant Mfg Co.* cases which are now pending before this Court. The same reasons which justified the request for a writ of certiorari in those cases justify the request in this case. It is a matter of great public importance to the City of New York that this case be heard together with the pending cases.

(b) Petitioner contends that in holding that the City sales tax law as applied to respondents' sales constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (i) does not discriminate against or otherwise burden interstate commerce, and (ii) is so limited in its operation that there is no possibility of multiple taxation.

(c) Petitioner suggests that, in holding that the particular transactions taxed required or necessarily involved

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interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court. *Wilcof Corporation v. Pennsylvania*, 294 U. S. 169 (1935); *Banker Brothers v. Pennsylvania*, 222 U. S. 210 (1911).

(d) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(e) The decision of the Court of Appeals unduly limits the taxing powers of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenue from other taxes.

The Commerce Clause should not be twisted into a device to prejudice local vendors by subjecting them to unjustifiable competitive disadvantages in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(f) The decision of the Court of Appeals that respondents' sales taxed are in interstate commerce, conflicts with

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the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis v. City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U. S. C. A., § 344, subd. (b); and that the final judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final judgment may be reversed and petitioner's original determination of tax liability on the part of the respondents confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., October 17, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

By SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

Supreme Court of the United States

No. October Term, 1939

JOSEPH D. MCGOLDRICK, Comptroller of
the City of New York,
Petitioner,

against

A. H. DUGRENIER, INC., Principal, and
STEWART & MCGUIRE, INC., Agent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

A. H. Du Grenier, Inc., is a Massachusetts corporation, having its plant and general offices at Haverhill, Mass. (R. 7, 45). It is engaged in the business of manufacturing and selling automatic vending machines (R. 45). These machines are standard products, color only being optional (R. 54). They are sold and distributed throughout the United States through an exclusive sales agency, Stewart & McGuire, Inc., a New York corporation with offices at 350 Fifth Avenue, New York City, which solicits orders on a commission basis for the Du Grenier and other products (R. 7, 8, 47, 53). A stock of samples is carried in the New York office of Stewart & McGuire, Inc., in addition to the samples used by the salesmen. These samples are subject to sale (R. 51, 53).

Most sales are made under conditional sales contracts (Taxpayer's Exhibit 1, R. 55), the remainder being made on open account (R. 46, 47). The contract requires the purchaser to make a cash payment "upon signing"; another cash payment "on delivery", and the balance is payable in monthly notes. The salesman has the purchaser sign this contract and the notes and make the initial cash payment. Stewart & McGuire, Inc., then forwards these documents with its own order to A. H. Du Grenier, Inc., at Haverhill, Mass. (R. 49-51). Miss Bouchard, treasurer of Du Grenier, testified that if the order is accepted by her "on the basis of credit and so forth", it is filled; if not, the money is refunded (R. 49-51). There is no testimony of any direct communication between the customer and the Du Grenier Company in Haverhill, Mass., nor of the communication to the customer by the company of an "acceptance" of the order. As the contract (Taxpayer's Exhibit 1) is always recorded (R. 46), and title to the machines is expressly reserved to the seller until full compliance with the terms thereof by the purchaser, it is apparent that this so-called "acceptance" is a mere formality. As the witness testified, the contract "is what makes us clinch the payments" (R. 52). The machines and prices being standard (R. 54) and a stock of machines being maintained at Haverhill (R. 47), the ability of the plant to fill a given order does not enter into the question of acceptance.

The Du Grenier Company under the contract (Taxpayer's Exhibit 1) not only retains title until the full payment of the purchase price, but reserves the right to repossess the machines upon any default. Upon the buyer's fulfillment of all of the terms of the contract, it provides:

"Seller will give a clear bill of sale to said Machines to Buyer and convey title to him."

The contract requires Du Grenier *to deliver the machines to the buyer's* place in New York City. Shipment is made by freight or truck, or whichever way the buyer may specify (R. 51). Stewart & McGuire, Inc., do the advertising, make up their own catalogue, and assume all the sales expenses (R. 51, 52, 54).

The City sales tax imposed upon these sales is a general non-discriminatory tax of 2% upon every "transfer of title or possession", in the City of New York, of tangible personal property purchased for use rather than for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner as City Comptroller. The tax is not imposed where goods, although purchased in New York City, are delivered to consumers outside the City. Article 94 of the Comptroller's Regulations: *Matter of C. G. Gunther's Sons v. McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Jurisdictional Statement and Assignment of Errors.

The Court will find these at pages 2 and 5 of the petition, *supra*, respectively.

Preliminary Statement.

The sole question involved in this case and the companion *Berwind-White* case is the validity of the New York City mandatory consumers' sales tax as applied to goods shipped into the state from a point outside the state. This Court has already consented to pass on this question by granting writs of certiorari in *McGoldrick v. Felt & Tarrant Mfg. Co.*, 307 U. S. (June 5, 1939), and *McGoldrick v. Com-*

pagnie Générale Transatlantique, 307 U. S. (June 5, 1939), which are now pending on the current docket of this Court. On October 9, 1939, this Court granted the request of the City that the hearing of those cases be deferred until December 4, 1939 or such time as the petitions for certiorari in this case and the companion *Berwind-White* case shall have been acted upon. These two cases in which writs of certiorari are now requested involve factual situations which are substantially similar to those now before this Court. If these petitions for certiorari are denied the City may be in the position of prevailing over the *Compagnie Generale Transatlantique* and the *Felt & Tarrant Company* in this Court, yet left without redress against these similarly situated taxpayers.

POINT I.

The New York City sales tax, as applied to the respondents' sales, does not impose an unconstitutional burden on interstate commerce.

The question is whether the tax as applied to respondents' sales imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is non-discriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is

no possibility of multiple taxation. *Western Live Stock v. Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938); *Coverdale v. Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local business would be discriminated against were the tax at bar held valid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchases of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumers' taxes imposed by the buyer's state, viz.:

a motor fuel (sales) tax (*Wiloil Corporation v. Pennsylvania*, 294 U. S. 169 [1933]); a use (sales) tax (*Monamotor Oil Co. v. Johnson*, 292 U. S. 86 [1934]); a "receiving" (sales) tax (*J. Bacon & Sons v. Martin*, 303 U. S. 380 [1939]); or a property (sales) tax (*Hinson v. Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 [1938]; *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed on the purchaser by the purchaser's State and the tax could not be imposed on the same sales by the seller's State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City taxes New York City purchasers on their purchases in that City, and Massachusetts taxes Massachusetts purchasers on their purchases there. Massachusetts could not claim the right to tax the purchasers of vending machines on their acquisition of property in New York City, any more than New York City could tax a Massachusetts purchaser on his acquisition of property in Massachusetts. The doctrine of territoriality as well as that of multiple taxation would forbid such a result.

4. The decisions of this Court have never gone so far as to say that a company doing some interstate business may not, when it enters a foreign state, be compelled to assume the burden, borne by domestic sellers, of collecting from its customers and transmitting to the authorities a sales tax imposed upon such customers by local law. Cf.

Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939). Otherwise, foreign vendors would obtain unjustifiable advantages over local competitors who are required to collect the 2% tax. Business would be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion would be fostered.

Comparable taxes have always been upheld.

So far as we are aware, this case, and the two cases in which this Court granted certiorari on June 5, 1939, are the first cases presented to this Court in which it has been urged that a retail sales tax levied upon a purchaser-consumer imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939); *Southern Pacific Company v. Gallagher*, 306 U. S. 167 (1939); *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S. 182 (1939); *J. Bacon & Sons v. Martin*, 305 U. S. 380 (1939); *Western Live Stock v. Bureau*, 303 U. S. 250 (1938); *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169 (1935); *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934); *Edel-*

man v. Boeing Air Transp., 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co. v. Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co. v. Query*, 286 U. S. 472 (1932); *Banker Brothers v. Pennsylvania*, 223 U. S. 210 (1911); *Woodruff v. Parham*, 8 Wall. 123 (1868); *Hinson v. Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In all of them the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co. v. Gallagher*, *supra*, as the following tabular comparison plainly shows:

California Tax.

1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.

2. The tax is a given percentage of the sales price.

3. The tax is paid by the purchaser at the time of the sale.

4. The tax is collected by the vendor, who files the returns.

New York City Tax.

1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.

2. The tax is a given percentage of the sales price.

3. The tax is paid by the purchaser at the time of the sale.

4. The tax is collected by the vendor, who files the returns.

California Tax.

5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.

6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.

7. The tax is on a local event *i. e.*, "the exercise of right or power . . . incident to the ownership of that property" other than resale.

New York City Tax.

5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.

6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.

7. The tax is on a local event, *i. e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify varying constitutional treatment. As stated by this Court in *Southern Pacific Company v. Gallagher, supra*, 306 U. S., at page 177:

"State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed." (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II.

Respondents' sales do not require or necessarily involve interstate shipment, as that phrase is used in *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 174.

In holding that respondents' sales required or necessarily involved interstate shipment, we submit, the Court misapprehended the decisions of this Court in *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169 (1935), and *Banker Brothers v. Pennsylvania*, 222 U. S. 210 (1911).

In the *Wiloil* case, *supra*, as in the case at bar, the sale was made in the buyer's State, called for delivery of the merchandise in that jurisdiction, and related to standard goods. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

"Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

"There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff v. Par-*

ham 8 Wall. 123, 137. *The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

"As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore v. N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland v. Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion.

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience and economy) from outside the State, be exempted from a general consumers'

sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondents' purchasers obtain the protection of the laws of New York for their purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., October 17, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner.

MORRIS L. HEATH,
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APPENDIX A
Provisions of Local Law
LOCAL LAWS OF THE CITY OF NEW YORK

—
FOR THE YEAR 1934.
—

No. 24

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor.
Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.

2. Imposition of tax.

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3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

Section 1. Definitions. When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

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ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

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ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

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Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection of the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

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in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

* See footnote, *ante*, p. 24.

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paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a ven-

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dor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the periods ending February twenty-eighth and May thirty-first and within fifteen days from the expiration of the periods ending August thirty-first and December thirty-first. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five,* inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of

* See footnote, *ante*, p. 24.

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receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice. [*Amended by Local Law No. 23 of 1935.*]

§ 6. Payment of taxes. At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the

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surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days, after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice

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of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. Proceeding to recover tax. Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that pro-

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vided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. Notices and limitations of time. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall

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not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause

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shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. Administration of oaths and compelling testimony.

The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

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A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of regis-

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tration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the

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time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay ~~or~~ fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprison-

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ment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or

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other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local

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law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B
Provisions of State Enabling Act
LAWS OF NEW YORK

1934

CHAPTER 873.

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor.
Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five * to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective

* The powers have been annually extended and have not yet expired.

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and ending December thirty-first, nineteen hundred thirty-five,* or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition

* See footnote, *ante*, p. 41.

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of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, SS.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C.

Memorandum Opinion of the Appellate Division.

In the Matter of the Application of A. H. DUGRENIER, INC., Principal, and STEWART & MCGUIRE, INC., Agent, Petitioners, for an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent, to Review a Determination.—Determination unanimously annulled, with fifty dollars costs and disbursements to the petitioners, on the authority of *Matter of National Cash Register Co. v. Taylor* (276 N. Y. 208); *Matter of United Artists Corp'n v. Taylor* (248 App. Div. 207; aff'd, 273 N. Y. 334); and, also, *Matter of Felt & Tarrant Mfg. Co. v. Taylor (McGoldrick)*, (254 App. Div. 246; aff'd, 279 N. Y. 678); *Matter of Sears, Roebuck & Co. v. Taylor (McGoldrick)*, (254 App. Div. 669; aff'd, 279 N. Y. 184); *Matter of Compagnie Générale Transatlantique v. McGoldrick* (254 App. Div. 237; aff'd, 279 N. Y. 192). The comptroller is directed to make refund to petitioner of the tax and penalties paid, with interest thereon from the date of payment. Settle order on notice. Present—MARTIN, P.J., GLENNON, UNTERMYER, DORE and CALLAHAN, JJ.

[255 App. Div. 961]



Supreme Court of the United States

No. 474. October Term, 1939.

JOSEPH D. MCGOLDRICK, Comptroller of
the City of New York,
Petitioner,
against

A. H. DUGRENIER, Inc., Principal, and
STEWART & McGUIRE, Inc., Agent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 26, 1939.

WILLIAM C. CHANLER,
*Corporation Counsel of the City
of New York,*
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

WILLIAM C. CHANLER,
SOL. CHARLES LEVINE,
MILTON SANDBERG,
of Counsel.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on December 4, 1939, to review a final order of the Court of Appeals, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of tax in controversy is \$6,203.27, with interest, for the period from December 10, 1934 to September 30, 1936 (R. 6-7, 45).

The Court of Appeals nullified the petitioner's determination upon the sole ground that to require the respondents to collect the sales tax from their New York customers on local purchases of vending machines shipped from Massachusetts, was violative of the Commerce Clause (Art. I, Sec. 8, Cl. 3).

Opinions Below.

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 46), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 255 App. Div. 961 (1938).

The Court of Appeals wrote no opinion, merely affirming with costs (281 N. Y. mem. 32, 22 N. E. (2d) 172 [1939]). In a supplemental memorandum on motion for reargument or amendment of the remittitur, the Court of Appeals declared that the decision below was affirmed (R. 55) "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y. mem. 93, 22 N. E. (2d) 764 [1939]).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred upon this Court by U. S. Code, Title 28, Sec. 344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of the decision (R. 55), a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

A. H. DuGrenier, Inc., one of the respondents, is a Massachusetts corporation engaged in the business of manufacturing and selling automatic vending machines (R. 4, 32). All of its sales are made through Stewart & McGuire, Inc., the other respondent, a New York corporation (R. 4) with its offices in New York City (R. 35, 36), which operates on a commission basis (R. 4-5, 33).

The machines are standard products, color only being optional (R. 39). They are sold by the personal solicita-

tion of Stewart & McGuire's salesmen (R. 36). Samples are carried in the New York office, in addition to the samples used by the salesmen (R. 37, 38). On occasion the samples are sold (R. 37-39), and, of course, such sales are taxable. The machines involved in the disputed sales are not manufactured to order, but are held at Haverhill, Mass., in stock sizes in quantity sufficient to meet future demands (R. 33-34, 39).

Most sales are made under conditional sales contracts under which title to the machines does not pass to the New York City purchaser until full payment is made (Taxpayer's Exhibit 1, R. 40A). Under these contracts the purchaser is required to make one payment "upon signing", another "on delivery" and the balance each month thereafter (*ibid.*). The Stewart & McGuire salesman presents the contract to the purchaser for signature, taking back the signed contract, the initial cash payment and the notes, if any (R. 35-38). These documents are then forwarded to DuGrenier at Haverhill, Mass. (*Ibid.*) DuGrenier delivers the machines directly from Massachusetts to the buyer in New York City, by whatever mode of shipment the buyer has specified (R. 37).

While all orders taken are subject to confirmation by DuGrenier in Haverhill, Mass. (R. 33, 35), there is no evidence that the customer is ever notified of confirmation. The requirement of Haverhill confirmation apparently serves no purpose other than to allow for credit checking (R. 35-36). That the credit checking is a mere formality is evidenced by the fact that DuGrenier relies primarily on its retention of title to the machines (Taxpayer's Exhibit 1, R. 40A) as its security for payment (R. 38).

The New York City Sales Tax Law.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by

which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis.¹ As appears from the Appendix of Statutes to be submitted on the argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B] and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people . . . from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by Local Laws No. 20 of 1934, as amended (printed as Appendix A in the Appendix of Statutes), No. 29 of 1935 and No. 31 of 1936,² is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).³

¹ Certain of these measures were before this Court in *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

² The sales covering the period December 10, 1934 to December 31, 1935, were taxed under Local Law No. 20 of 1934, as amended. Those for the period January 1, 1936 to June 30, 1936, were taxed under Local Law No. 29 of 1935, and for the period July 1, 1936 to September 30, 1936, under Local Law No. 31 of 1936. The Local Laws for the later periods are identical in every material respect with Local Law No. 20 of 1934, as amended.

³ Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

1) Consumers of goods,¹ excluding food and drugs on prescription.

2) Consumers of utility services;² i. e., gas, electricity, telephone, etc.

3) Customers in restaurants and cafes where the meals are over \$1.³

The tax is imposed not on the seller⁴ but on the buyer. The statute makes this abundantly clear and the Courts have so held (*Matter of Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113, 124 [1937]; *Matter of Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, 297 [1938]).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties (Sec. 15). It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the

¹ The vendors of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

² The vendors of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

³ The restaurateurs are liable for a business tax.

⁴ No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2).

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondents' sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wilcoil Corporation v. Pennsylvania* (294 U. S. 169 [1935]).

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Argument.

In our brief in the companion case of *McGoldrick v. Berwind-White Coal Mining Co.*, we discussed at length the principles and authorities applicable to the case at bar. The facts in the companion case of *McGoldrick v. Felt & Tarrant Manufacturing Co.* are indistinguishable from the facts at bar. Copies of our briefs in the two cases referred to have been furnished to counsel for the taxpayers in the case at bar.

It was our purpose in those briefs to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax here in controversy are the

same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax at bar must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

In order to avoid unnecessary repetition, we respectfully refer the Court to our briefs in the *Berwind-White* and *Felt & Tarrant* cases for a statement of our position.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 26, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
*Corporation Counsel of the City
of New York,*
Counsel for Petitioner.

WILLIAM C. CHANLER,
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MILTON SANDBERG,
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Supreme Court of the United States

OCTOBER TERM, 1939

No. 474

**JOSEPH D. McGOLDRICK, Comptroller of the City
of New York,**

Petitioner,

against

**ARTHUR H. DUGRENIER, INC., Principal, and
STEWART & McGUIRE, INC., Agent,**

Respondents.

BRIEF FOR RESPONDENTS

✓ **JOHN H. JACKSON,**

✓ **HAIG H. DAVIDIAN,**

Attorneys for Respondents.

Supreme Court of the United States

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JOSEPH D. McGOLDRICK, Comptroller of the City
of New York,

Petitioner,

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ARTHUR H. DUGRENIER, INC., Principal, and
STEWART & McGUIRE, INC., Agent,

Respondents.

BRIEF FOR RESPONDENTS.

This case presents an aspect of the question involved in *McGoldrick v. Compagnie Generale Transatlantique*, *McGoldrick v. Felt & Tarrant Manufacturing Company*, and *McGoldrick v. The Berwind-White Coal Mining Company*. In the first two of these cases, which are Nos. 44 and 45 on the current docket of the Court, certiorari has been granted. In *McGoldrick v. The Berwind-White Coal Mining Company*, the respondent has filed a memorandum stating that it will not oppose the granting of certiorari. Although we shall contend that the decision of the State Court was correct and that (1) because of the failure of the petitioner's brief to refer to the provisions of the Personal Property Tax Law, No. 25 of the Local Laws of the City of New York, for the year 1934, the elements of the question to be decided have not been adequately presented

to this Court, and (2) certain factual elements in the instant case are more favorable to the respondents than in the other cases, we do not, in the circumstances, oppose the granting of certiorari.

If certiorari is granted we respectfully ask that the case be set down for argument together with Nos. 44, 45 and 475.

Respectfully submitted,

JOHN H. JACKSON,

HAIG H. DAVIDIAN,

Attorneys for Respondents.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 474.

JOSEPH D. McGOLDRICK, Comptroller of the
City of New York,

Petitioner,

against

A. H. DUGRENIER, INC., Principal, and
STEWART & McGUIRE, INC., Agent,

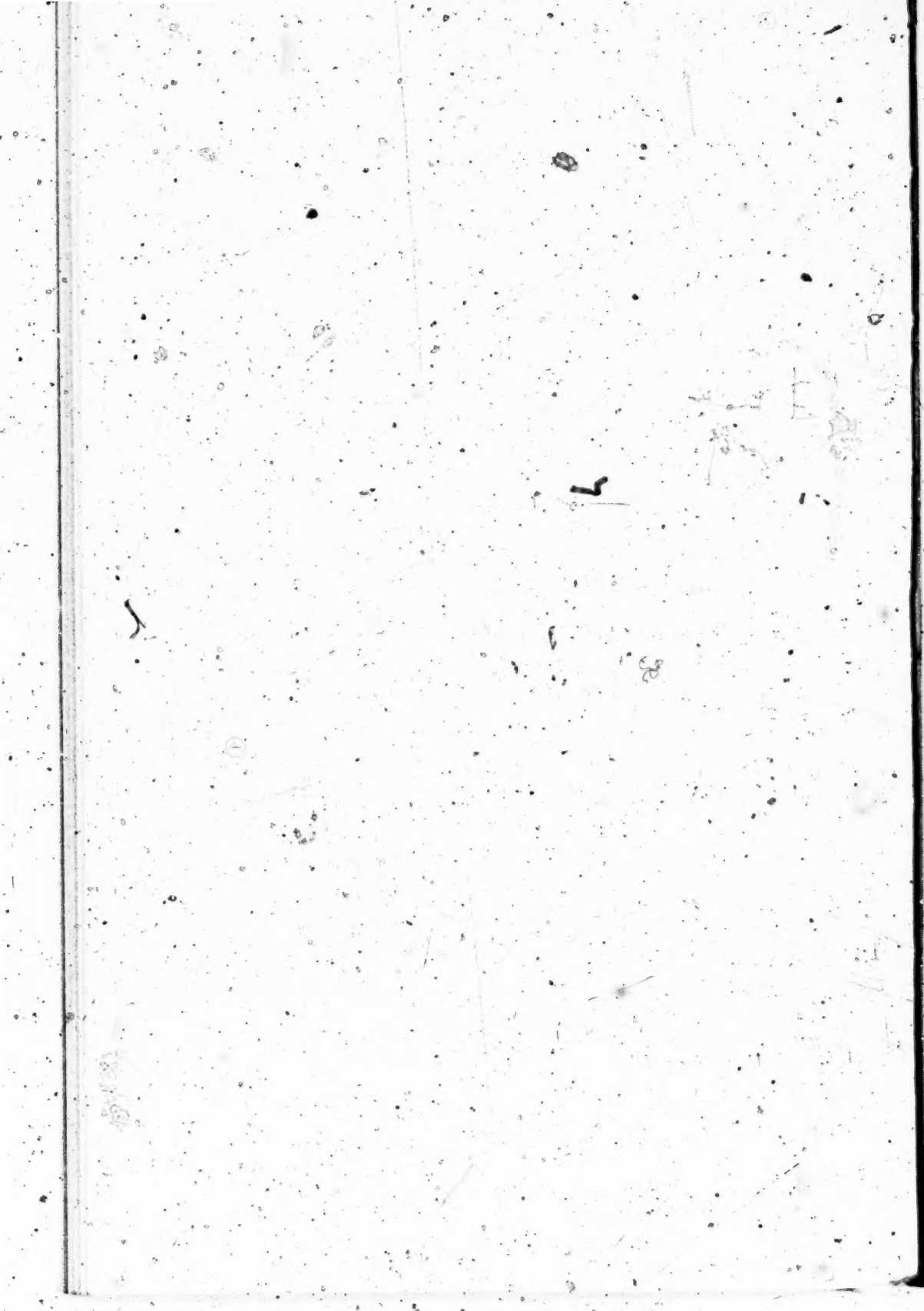
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

JOHN H. JACKSON,
HAIG H. DAVIDIAN,

Attorneys for Respondents.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 474.

JOSEPH D. MCGOLDBICK, Comptroller of the
City of New York,

Petitioner,

against

A. H. DUGRENIER, INC., Principal, and
STEWART & MCGUIRE, INC., Agent.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS.

This case is before the Court on a writ of certiorari to review a judgment of the Supreme Court of the State of New York, entered pursuant to the order of the Court of Appeals of the State of New York (R. 48), annulling the determination of petitioner that respondent A. H. DuGrenier, Inc., as principal, and respondent Stewart & McGuire, Inc., as agent, were liable for certain New York City sales taxes. After a hearing before petitioner's predecessor as Comptroller of the City of New York, the Comptroller made a final determination of a deficiency in tax in the amount of \$6,203.27 (including interest and penalties) (R. 29), which amount respondent A. H. DuGrenier, Inc.,

thereafter paid to the Comptroller under protest (R. 30). Proceedings were taken by the respondents to obtain a review of the Comptroller's determination by the Appellate Division of the Supreme Court, which Court thereafter made its order (R. 43) upon which judgment was entered (R. 44) annulling the determination and directing refund to the respondent A. H. DuGrenier, Inc., of the amount paid. On appeal to the Court of Appeals, the judgment of the Appellate Division was affirmed.

Opinions Below.

The memorandum opinion of the Appellate Division (R. 46) is reported in 255 App. Div. 961. The affirmance by the Court of Appeals was without opinion (R. 49). After the entry of judgment on the order of the Court of Appeals, the remittitur was amended to state that the order of the Appellate Division was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (R. 1, Sec. 8, Cl. 3) of the Constitution of the United States (R. 55)."

Statement of Facts.

The respondent A. H. DuGrenier, Inc., is a Massachusetts corporation, engaged in the business of manufacturing automatic vending machines at Haverhill, Massachusetts (R. 32). It has no office or employee in New York and does not keep any stock of goods there (R. 32). The respondent Stewart & McGuire, Inc., a New York corporation, is the exclusive agent of A. H. DuGrenier, Inc., for the sale of machines throughout the entire country (R. 34, 35). It maintains an office in New York City (R. 33). All of the expenses incurred in the sale of the DuGrenier machines are paid by Stewart & McGuire (R. 40).

Stewart & McGuire, Inc., is not authorized by A. H. DuGrenier, Inc., to accept orders on its behalf. All orders must be accepted by A. H. DuGrenier, Inc., at Haverhill (R. 37, 35). Most of the sales are made on conditional sales agreements, although a few are made on open account (R. 34). In the usual transaction a conditional sales agreement is executed by the customer in triplicate, forwarded to Haverhill for acceptance, and if accepted and executed by A. H. DuGrenier, Inc., one of the triplicate forms is recorded in the proper public office, one is retained by A. H. DuGrenier, Inc., and one is sent to the customer (R. 33, 34).

Delivery of the machines is made by A. H. DuGrenier, Inc., directly to the customers (R. 37). The customer pays the freight (R. 37). Stewart & McGuire, Inc., keeps some sample machines in its office, but these are sold to it by A. H. DuGrenier, Inc. (R. 37).

The statement at page 3 of the petitioner's brief to the effect that there is no evidence that the customer is ever "notified of confirmation", is inconsistent with the evidence just stated, to the effect that a signed copy of the contract is mailed to the customer. The statement that the checking of customer's credit as a condition to acceptance of the order "is a mere formality" (Petitioner's Brief, p. 3) is without foundation in the record.

Questions Presented.

The scope of the decision about to be reviewed cannot be understood without reference to *Matter of National Cash Register Co. v. Taylor*, 252 App. Div. 90; affd. 276 N. Y. 208; cert. den. 303 U. S. 656. The decision of the Appellate Division in that case rested not on the constitutional question now presented to this Court, but on the construction of the Enabling Act pursuant to which the City im-

posed the tax (Laws of 1934, Ch. 873). The Enabling Act excluded from the field of the City's power to tax "any transaction originating and/or consummated outside of the territorial limits of the City". The Appellate Division held that a sale "originated", within the meaning of the Enabling Act, at the place where the contract of sale was made, and that consequently where, as in the instant case, orders for the shipment of goods were accepted outside of the State, the City could not impose a tax upon the sale.

The Court of Appeals rested its decision solely on the constitutional ground and expressly withheld any expression of opinion upon the question of construction passed upon by the Appellate Division (See opinion of LEHMAN, J., at p. 214).

The instant case was decided by the Appellate Division after the decision of the Court of Appeals in the *National Cash Register* case, and it is the Court of Appeals decision in that case which is cited in the Appellate Division memorandum opinion. The other cases cited are cases in which the Court of Appeals decision in the *National Cash Register* case was followed. It is clear therefore that the instant case was decided on the constitutional ground. It is equally clear, however, that the only decision of the New York courts on the question of the construction of the statute is the Appellate Division decision in the *National Cash Register* case, 252 App. Div. 90. While in its subsequent decisions invalidating the tax the Appellate Division adopted, as it was bound to, the ground given by the Court of Appeals in the *National Cash Register* case, it has never retracted or modified anything which was said in its own opinion in the same case, and so far as the New York Courts have spoken they have held that the local law, as

applied to sales here involved, exceeds the power delegated to the City by the State legislature.

It follows from the foregoing that the statement in the petitioner's brief (p. 6) that the Court of Appeals by its amendment of the remittitur "has indicated clearly that the tax assessment here involved is in entire conformity both with the New York City local law pursuant to which it was imposed (Local Law No. 20 of 1934, as amended), and the State enabling act pursuant to which the local law was enacted (New York Laws of 1934, ch. 873)" is wrong. The Appellate Division has held the contrary (with respect to the sort of sales involved in this case), and the Court of Appeals had declined to pass on the question because it considered the constitutional ground controlling and sufficient.

If this Court should hold the tax constitutional the ultimate question of tax liability will still depend upon a determination of the question whether these sales "originated" in the City of New York within the meaning of the Enabling Act. In an analogous case, *State Tax Commission v. Van Cott*, 306 U. S. 511, this Court recently, upon reversal of the State Court, remanded the cause for consideration of the question arising under the State law; and it is believed that this procedure should be followed here if the judgment is reversed upon the constitutional question.

The determination of the Comptroller purports to assess the tax against the respondent Stewart & McGuire, Inc., as "agents" as well as against the respondent A. H. DuGrenier, Inc. (R. 29). There is no warrant in the local law for assessment against the agent of either vendor or purchaser, but the question having become moot by pay-

ment of the tax by the respondent A. H. DuGrenier, Inc., the point is not pressed.

Summary of Argument.

A. The New York City sales tax as applied to the transactions involved in this case violates Article 1, Section 8, Clause 3 of the Constitution of the United States in the following respects:

I. It imposes a direct and immediate burden upon transactions constituting interstate commerce.

II. It exposes the Massachusetts manufacturer to taxation by both New York and Massachusetts on the same transaction.

III. It discriminates between the Massachusetts manufacturer seeking to sell his machines here and some of his local competitors. It is true that locally manufactured vending machines are subjected to the same tax, but the vending machine, being a labor saving device, is competitive not merely with other vending machines, but with local labor. The tendency of the tax is to encourage the employment of salesmen to replace machines. This is no less an interference with interstate commerce because it is also an interference with local commerce.

B. *Felt & Tarrant Manufacturing Co. v. Gallagher*, 306 U. S. 62, has no bearing on the case. There this Court upheld the constitutionality of a California statute which made the non-resident seller the agent of the State to collect a tax imposed on property in the State. New York City has a personal property tax analogous to this California tax, but the local law which imposes the New York City personal property tax contains no provision imposing any duty of collection upon the non-resident seller. If the tax in this case is to be sustained, it must therefore be

sustained not as a tax on the ownership or use of property, but as a sales tax.

The New York City Personal Property Tax Law is not printed in the appendix of statutes submitted to the Court by the petitioner. It will be found set forth in full as an appendix to this brief.

On page 6 of the petitioner's brief we are referred to the argument made in support of the tax in the *Berwind-White Coal Mining Co.*, and the *Felt & Tarrant Manufacturing Co.* cases, which immediately precede this case on the calendar. Much that is in these briefs, however, does not bear upon the facts of the instant case. For example, we assume that the specification of error (b) appearing in all of these cases to the effect that the sales which were the subject of the tax were not contracts for interstate shipment and do not require or necessarily involve interstate commerce, is intended to relate to some other case than this. It obviously has no application here.

POINT I.

The tax is violative of the Commerce Clause because it imposes a direct and immediate burden upon transactions constituting interstate commerce.

The tax here is on the sale itself. Section 2 of the Sales Tax Law provides:

"§2. Imposition of Tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of: • • •"

Section 1 contains the following definition:

"(3) The word 'sale' or 'selling' means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law."

What constitutes interstate commerce is "a practical and not a technical consideration" (*Davis v. Virginia*, 236 U. S. 697); but it has never been doubted that once a transaction or activity is found to be or constitute interstate commerce the imposition of a tax on that transaction or activity by the State is forbidden by the Commerce Clause. There is a clear distinction between a tax on such a transaction or activity and one upon some subject matter which is within the taxing power of the State but which may nevertheless have the purpose or effect of interfering unduly with interstate commerce. In a case of the latter kind the tax will not be invalidated unless its purpose or effect is discriminatory. No question of discrimination, however, arises where the subject matter of the tax is some integral part of the process of interstate commerce, *i. e.*, a matter over which the Federal Government has the exclusive power of regulation. Upon this point the decisions of this Court have been consistent from *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), to the recent decisions in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434.

In *Robbins v. Shelby County Taxing District*, *supra*, at page 497, the Court said:

"Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

In *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 328, the Court said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 568, **BRANDEIS, J.** (dissenting), said:

"* * * A state tax is obnoxious to that provision of the Federal Constitution only if it directly burdens interstate commerce, or (where the burden is indirect) if it obstructs or discriminates against such commerce."

"* * * A tax is a direct burden, if laid upon the operation or act of interstate commerce." (p. 569)

While these quotations are from a dissenting opinion, the dissent was from a decision invalidating a State tax attacked under the Commerce Clause, and it may consequently be taken as a statement of the law as favorable as possible to the petitioner's contentions in the instant case.

In *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267, this Court referred to a direct burden as one "levied upon or measured by" the interstate transaction, and in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, a distinction was drawn between "taxes on interstate commerce and its instrumentalities" and on "operations closely connected with but distinct from that commerce."

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 312, the Court says:

"* * * The opinion of the State Supreme Court stresses the generality and nondiscriminatory charac-

ter of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

The Court cites as authority for this rule *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Spalding & Bros. v. Edwards*, 262 U. S. 66, 69; *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, 393.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 438, the Court said:

"The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles."

The tax which we are now considering is laid upon a transaction of sale between a Massachusetts manufacturer not doing business in New York and a resident of the City. It calls for the shipment of goods from the seller in Massachusetts direct to the purchaser in New York City. It is the type case of interstate commerce; an integral or unitary act which has one phase or aspect in New York and another phase or aspect in Massachusetts. The contract is made in Massachusetts: the title usually passes in New York, but, as was said by HOLMES, J., in *Dozier v. Alabama*, 218 U. S. 124,

"... what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed."

POINT II.

The tax is violative of the Commerce Clause because it exposes the manufacturer to the danger of double taxation on the same transaction.

In the petitioner's brief in the *Berwind-White* case (p. 40), it appears to be conceded that if the transaction which is the subject of the tax could consistently with the Fourteenth Amendment be taxed in more than one State, the tax is unconstitutional under the Commerce Clause, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, are referred to as declaring that rule of law. In the respondent's brief in the *Berwind-White* case, it is argued at length that the possibility of multiple taxation exists under the facts there presented, and we adopt that argument. But the instant case is stronger for the taxpayer; for here the contract of sale was made in Massachusetts and it is beyond the possibility of dispute that it would be taxable there.

POINT III.

As an economic fact the tax is discriminatory as against residents of other States and tends substantially to discourage the sale of vending machines in interstate commerce.

In arguing this point we of course do not concede that it is necessary, in order to invalidate the tax under the commerce clause, that it be discriminatory.

To assume because the local manufacturer of vending machines pays the same tax as the foreign manufacturer no interference with interstate commerce results, is to take far too narrow a view of the economic process. Competition operates not only between identical goods and services,

but also between things, one of which may be used as a substitute for the other, *eg.*, candy competes with cigarettes, as was manifested not many years ago by the enormous expenditure of money by one of the tobacco companies in advertising the "slogan", "Reach for a Lucky instead of a sweet". The economic law is stated in Professor Seligman's *Principles of Economics* (Eleventh Edition, Revised, 1926), pages 142-3, in the following language:

"Every individual is constantly debating with himself whether to purchase one commodity in preference to another. Where he is on the margin of doubt or indifference the slightest alteration in the price will cause him to substitute something else. The principle involved is hence called the principle of substitution. The vendor must constantly be on the watch lest any increase of price cause the disappearance of his sales. We substitute, however, not only one thing for another, but also one agency of production for another; in the crucible of economic wants everything is finally tested by its capacity to afford the greatest satisfaction. Not only will the consumer choose now this and now that commodity, *but the employer will increase now his labor force, now his machinery* so as to secure the best results. The least change in the rate of wages or interest may lead him to substitute the one for the other."

The vending machine is a mechanical salesman. It makes change and delivers goods to the purchaser just as a clerk behind the counter does. It has certain advantages over the human salesman, *e. g.*, it is never guilty of petty dishonesty. On the other hand, it lacks oral persuasiveness. The proprietor of a store or restaurant must weigh these considerations and then put the cost of the machine in the balance as against the salesman's wages. Clearly the imposition of a 2% tax would lead the store proprietor who is in the marginal position to employ labor, which is

not a commodity (under the law) or a subject of commerce, rather than buy a machine which is the subject of commerce. The direct effect of the tax is to promote resistance to the sale of machines and thus reduce traffic in goods, both interstate and otherwise.

If one State is free to tax the sale of goods in interstate commerce, provided only that it taxes its own identical goods at the same rate, the power could easily be used to exclude goods of a type not locally manufactured in order to give an advantage to local manufacturers of goods which could be substituted for them. For example, New York State having many factories for the manufacture of candy, but none or few for cigarettes, may promote its own industry by imposing a burdensome sales tax on cigarettes and none on candy. This would actually, even though not ostensibly, be discrimination as against the non-resident manufacturer of cigarettes, although if we confine our attention to the identical article, local and non-resident sellers are taxed at the same rate. The effect of such legislation would be to promote trade rivalries and reprisals between the States. This it was the fundamental object of the commerce clause to prevent.

POINT IV.

***Felt & Tarrant Manufacturing Co. v. Gallagher*, 308 U. S. 62, is not analogous.**

The California use tax was sustained as a tax on property or use of property. No such classification of the tax in the instant case would be possible. To treat the distinction between a tax on property and one on interstate sales as one of form rather than substance, as petitioner appears to do, would ignore a long line of decisions of this Court and would reduce the subject matter to a chaotic condition.

But if this tax is to be treated as a tax on property, such as the tax involved in the *Felt & Tarrant* case, and not on interstate commerce, it is to the New York laws relating to *property* taxes rather than to sales taxes that we must look in order to ascertain the legislative intent with respect to the imposition of liability on a non-resident vendor of the taxed property. The New York City Personal Property Tax Law contains the New York provisions with relation to the kind of tax considered in the *Felt & Tarrant* case. It, and the City Sales Tax Law, taken together, embody a comprehensive scheme of taxation similar to the California sales and use taxes.

The Personal Property Tax Law (Local Law No. 25*), printed in full as an appendix to this brief, provides for the imposition of "a tax upon certain personal property situated or owned within the City of New York." Section 1 of the law, dealing with "IMPOSITION OF TAX", provides for a 2% tax on the value of "certain articles of personal property situated or owned within the City of New York" to be paid by the owner, exempting, however, articles upon which a sales tax has been paid. In this respect the law is substantially the same as the California use tax act. There is however a fundamental difference between the two laws in the respect that the California statute requires the non-resident seller to act as the State's collecting agency with respect to the use tax which may become due from California storers, users or consumers, or to insure payment of the tax if it fails to collect. There is no similar provision in the New York Personal Property tax. Section 7 of that act provides:

*Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934."

"§ 7. **PAYMENT OF TAXES.** In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, *unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.*"

It is quite clear that the italicised clause excludes the non-resident prior owner of the property from any duty of collection or payment, and manifests the legislative intent in New York to exempt the non-resident vendor from any duty or liability with respect to property or use taxes.

CONCLUSION.

The judgment should be affirmed. If, however, the Court should decide that the tax is not violative of the Commerce Clause, the case should be remanded to the State Court for consideration of the question of construction of the Enabling Act.

Dated: December 30, 1939.

Respectfully submitted,

JOHN H. JACKSON,

HAIG H. DAVIDIAN,

Attorneys for Respondents.

APPENDIX**Local Law No. 25.†**

A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health by the imposition of a tax upon certain personal property situated or owned within the city of New York.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. IMPOSITION OF TAX. During the period commencing on January first, nineteen hundred thirty-five, and ending on December thirty-first, nineteen hundred thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named articles of personal property situated or owned within the city of New York.

- a. Furs and fur products.
- b. Radios, automatic sound and musical reproduction devices, and all other musical instruments of any kind whatsoever.
- c. Automobiles, motor trucks, busses, airplanes, motor boats or any other type of motor vehicle or any part or part of or for the same.
- d. Building materials, including all products or materials designed to be used or actually used for the affixation

† Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934." The provisions of this law were substantially reenacted by Local Law No. 31 of 1935 (as amended by Local Law No. 13 of 1935) and Local Law No. 28 of 1936.

to or improvement of real property, including all materials accessory to such affixation or improvement such as pipes, conduits or any item or material used in any manner in building construction or in the improvement of real property within the city of New York.

e. Machinery of every type and variety, including typewriters and all other business machinery and refrigerators and all other machinery or mechanical equipment for domestic use.

f. Furniture and interior furnishings of every type and variety, including all objects used for the furnishing or decoration of the interior of home, office or commercial buildings.

g. Jewelry, silverware, precious metals and precious stones.

§ 2. EXEMPTIONS. No tax, as imposed by section one of this title, shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the comptroller.

a. That the said article was purchased prior to January first, nineteen hundred thirty-five.

b. That the said article is of less than one hundred dollars in value, except in the case of building materials and supplies, in which event the exemption of this subsection shall not be applicable.

c. That the said article is one upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or local law twenty, of nineteen hundred thirty-four, as amended.

d. That the said article is a bona fide work of art.

e. That the said article has been manufactured within the city of New York for sale by the manufacturer upon

which sale a tax pursuant to local law number twenty of nineteen hundred thirty-four as amended, will be paid; or, that the said article constitutes a part of a dealer's stock within the city of New York and is owned only pending a sale upon which a tax pursuant to local law number twenty of nineteen hundred thirty-four, as amended, will be paid.

§ 3. VALUATION. For the purposes of the tax levied by this local law, such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price, and if such purchase price is not available such valuation shall be made in such manner as the comptroller shall direct.

§ 4. TIME AT WHICH TAX IS DUE. The tax imposed by this local law shall be due and payable on April fifteenth, nineteen hundred thirty-five, with respect to property acquired on or before March thirty-first, nineteen hundred thirty-five; on July fifteenth, nineteen hundred thirty-five with respect to property acquired on or before June thirtieth, nineteen hundred thirty-five, on October fifteenth, nineteen hundred thirty-five with respect to property acquired on or before September thirtieth, nineteen hundred thirty-five; and on January fifteenth, nineteen hundred thirty-six, with respect to all other property subject to tax hereunder. In the event that such personal property subject to the tax imposed by this local law shall be destroyed or shall lose its identity by affixation to real estate or otherwise the whole tax imposed by this local law shall be due and payable at the time of such destruction or such loss of identity by affixation or otherwise.

§ 5. COLLECTION OF THE TAX. The comptroller shall by regulation prescribe a method or methods for the collection of the tax imposed by this local law from the persons liable for the same. Except as otherwise prescribed herein, the owner of such property shall in all cases be liable for the tax herein imposed.

§ 6. RETURNS. Every owner of personal property subject to the provisions of this local law shall file with the

comptroller a return showing the amount of such personal property subject to such tax and the taxes payable thereon. Such return shall be filed on or before the date upon which such tax is due, and if such tax be paid upon the filing of such return, no penalty shall be assessed against such taxpayer.

§ 7. **PAYMENT OF TAXES.** In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.

§ 8. **DETERMINATION OF TAX BY THE COMPTROLLER.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient, the comptroller shall determine the amount of the tax due from such information as he may be able to obtain. The comptroller shall give notice of such determination to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall within thirty days apply to the comptroller for a hearing on such determination and shall deposit the full amount of such tax, with all penalties, with the comptroller, in which case the said determination shall be suspended until after such hearing as the comptroller, or his duly designated representative, may grant.

§ 9. **PROCEEDING TO RECOVER TAX.** Whenever any person shall fail to collect and pay over any tax and/or to pay

any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due there-

under as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 10. GENERAL POWERS OF THE COMPTROLLER. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York.

§ 11. ADMINISTRATION OF OATHS AND COMPELLING TESTIMONY. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper

proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 12. PENALTIES. Any person failing to file a return or to pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

§ 13. DISPOSITION OF REVENUES. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from

the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 14. APPLICATION; CONSTRUCTION. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 15. EFFECTIVE DATE OF LOCAL LAW. This local law shall take effect immediately.